No. 2729

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ENNIS-BROWN COMPANY (a corporation),
Appellant and Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY (a corporation), and SOUTHERN PACIFIC COMPANY (a corporation),
Appellees and Defendants.

APPELLANTS' OPENING BRIEF.

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Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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APPELLANTS'* OPENING BRIEF.

Statement of Case.

The above entitled suit and the fifteen suits consolidated with it were instituted for the purpose of quieting appellants' title to certain land lying between the west line of Front Street and the Sacramento River, comprising the main portion of the river front of the City of Sacramento, California, for an injunction against the assertion of any adverse interest in said land by the appellees and for general relief.

The appellee Southern Pacific Company is in possession of all the land described in the several amended bills of complaint; the complainants (appellants) are also

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* Because of the order of consolidation for purposes of appeal, made in the lower court (Tr. p. 43), reference to the appealing parties herein will be made in the plural and the effect of said order of consolidation will be discussed herein, beginning at page 144.

the owners and are in possession of the land facing Front Street on the east line thereof and opposite the parcels of river front described in the respective bills of complaint.

The suits were brought in June and September, 1914, under Sections 738, 379 and 380 of the Code of Civil Procedure of California, and, omitting the jurisdictional averments and description of property, the facts set up in each of the original bills of complaint (Tr. p. 1) are in substance these; that the complainant "is and at all the times mentioned herein was the owner in fee-simple" of the property described and "that the defendants and each of them claim an estate or interest in said property adverse to the complainant, which claim is without right", and

> "defendants have not nor has either of them any estate, title, right or interest in or to the property or any portion thereof; that the defendant Central Pacific Railway Company is not in possession of the premises involved or any part thereof".

The defendants answered the original bills and set up precisely similar defenses in each of the suits (Tr. p. 4), in substance the following: after denying title in complainants, they allege title and possession in the defendant Central Pacific Railway Company, it being further alleged that defendant Southern Pacific Company is in possession under a lease from the defendant Central Pacific Railway Company; the several statutes of limitation are pleaded and finally it is alleged that complainants are estopped to assert ownership and right of possession in the premises because the defendants

for many years have been in continuous possession, with full knowledge on the part of complainants and their predecessors in interest, using the land in the exercise of their business, as common carriers.

On March 1, 1915, the suits were set for trial at Sacramento for May 25, 1915.

On May 24, 1915, defendants moved to transfer the suits to the law side of the court upon the ground that it appeared that complainants had a plain, adequate and complete remedy in an action at law (Tr. p. 21); the court thereupon granted the motion to transfer to the law side, unless complainants should amend the bills of complaint within ten days (Tr. p. 22). The complainants filed amended bills in all respects similar to the original bills but containing the following additional averments (Tr. p. 14):

> "That defendants are and each of them is engaged in the general business of railroad corporations as common carriers of passengers and freight;" that the defendant Southern Pacific Company "is now and at all the times herein mentioned was in possession and using the land hereinabove described; that it maintains upon and over a portion of the property described in the amended bill herein a railroad main track over and upon which it operates trains in the exercise of its said business; to prevent the maintenance and operation of said railroad track would interfere with the service of said defendant Southern Pacific Company to the general public in the City of Sacramento, and in the County of Sacramento and elsewhere;
>
> "On other portions of said property said Southern Pacific Company maintains other railroad tracks which are switching tracks and a large structure known as the Sacramento freight sheds and

sheds used as a wharf, bordering upon the Sacramento River. The public interest neither of the inhabitants of the City of Sacramento nor of the County of Sacramento, nor of any other community requires the maintenance or continuance of said last mentioned tracks or said sheds by said Southern Pacific Company. That all of said tracks herein mentioned and sheds are used exclusively by the defendant Southern Pacific Company and said company claims that as a public service corporation it is entitled to the continuous and exclusive use of said tracks, sheds, and the land upon which the same are situated.

"That the four most important business streets in the City of Sacramento running toward the Sacramento River are I, J, K, and L Streets; that said land is situated near the foot of said streets and borders upon the Sacramento River, and together with the land adjacent thereto, is the most convenient point for the shipment of freight into and from the City of Sacramento; that the commerce of the City of Sacramento by water is approximately one-half of the commerce of said city; that the public interest of the citizens of the City of Sacramento and of the County of Sacramento and thereabouts requires that said property should not be used exclusively by said defendant Southern Pacific Company; that the use of said property by said Southern Pacific Company is subordinate to the requirement of public interest that the land upon which said sheds are built should be open to use by others than defendant Southern Pacific Company and to the title and rights of complainant therein and thereto."

Defendants thereupon moved to dismiss in each suit upon the grounds set out in their notice of motion to dismiss (Tr. p. 22) contending,

(a) That the amended bills do not state facts sufficient to constitute a valid cause of action in equity;

(b) That the amended bills unite two causes of action; namely, a cause of action against the Central Pacific Railway Company, out of possession, and a cause of action against the Southern Pacific Company, in possession;

(c) That the suits cannot be maintained against the defendant Central Pacific Railway Company, (1) because the amended bills contain no allegation of privity or community of interest between that defendant and the defendant Southern Pacific Company, (2) because it appears upon the face of the bills that complainants are not in possession and that the land involved is not vacant and unoccupied;

(d) That the suits cannot be maintained against defendant Southern Pacific Company, (1) because the amended bills show that said company is in possession, (2) because the bills show that said company is a public service corporation.

(e) That the suits cannot be maintained at all in law or equity because the amended bills contain no allegation of ownership in plaintiff at the time defendant Southern Pacific Company took possession.

On December 1, 1915, the court filed an opinion (Tr. p. 25) sustaining the contention of defendants in the foregoing particulars, (a), (c) and (d) and each of the subdivisions thereof, and holding that, if the complainants have any cause of action at all, their remedy is in an action for damages for the taking of the land, and granted complainants ten days within which to amend their amended bills of complaint. On December 15, 1915,

complainants applied to the clerk of the lower court for an order for a decree pro confesso under Equity Rule 32; said application was granted and an order therefor accordingly entered (Tr. p. 40). On December 20th, upon motion of defendants, the court made an order vacating and setting aside said order for a decree pro confesso upon the ground that the same had been inadvertently and inadvisedly made. On the same day upon motion of complainants the court made an order consolidating the sixteen suits for the purposes of an appeal, to which order an exception of the defendants was taken and allowed (Tr. p. 43), and later a decree of dismissal was entered in each of the cases (Tr. p. 45). Complainants appealed to this court and assigned and now assign as error the following:

Assignments of Error.

I.

(Original Assignment VII.)

The said court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court.

II.

(Original Assignment VIII.)

The said court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court against the defendant Central Pacific Railway Company.

III.

(Original Assignment IX.)

The said court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute a valid cause of action of cognizance in equity in this court against defendant Southern Pacific Company.

IV.

(Original Assignment II.)

The said court erred, in granting defendants' motion to dismiss the amended bill of complaint herein on December 1, 1915, by holding and deciding that the defendant Central Pacific Railway Company was not properly joined as a defendant herein with the defendant Southern Pacific Company.

V.

(Original Assignment III.)

The said court erred, in granting said motion, by holding and deciding that complainant, while out of possession, could not maintain herein its suit to quiet its title against the defendant Central Pacific Railway Company, while out of possession and while the land involved was occupied.

VI.

(Original Assignment IV.)

The said court erred, in granting said motion, by holding and deciding that said amended bill of complaint did not state facts sufficient to entitle complainant to main-

tain its suit herein to quiet title against defendant Southern Pacific Company while in possession.

VII.

(Original Assignment V.)

The said court erred, in granting said motion, by holding and deciding that the amended bill of complaint showed that complainant had a plain, complete and adequate remedy in an action at law in damages.

VIII.

(Original Assignment XVIII.)

The said court erred by holding and deciding that the defendants had not on December 1, 1915, submitted to the jurisdiction of this court in equity in this suit, and by refusing to hold and decide that said defendants had waived their right, if any they or either of them ever had, to object to the jurisdiction of this court in equity in this suit.

IX.

(Original Assignment X.)

The said court erred in making said decree dismissing said suit in that it is not stated in said decree that the dismissal of said suit is without prejudice to an action at law.

X.

(Original Assignment XI.)

The said court erred in not ordering said suit transferred to the law side of said court if said amended bill did not and does not state a cause of action of cognizance in equity in this court.

XI.

(Original Assignment XXII.)

The said court, in dismissing said suit, erred by holding and deciding that the bill of complaint as amended did not and does not state facts sufficient to constitute any valid cause of action at all.

XII.

(Original Assignment XIX.)

The said court erred in granting defendants' motion to vacate, set aside and rescind the order for a decree pro confesso, in favor of complainant, entered herein on December 15, 1915, by holding and deciding that said order had been inadvertently and inadvisedly entered.

XIII.

(Original Assignment XX.)

The said court erred in vacating, setting aside and rescinding the order for a decree pro confesso, in favor of complainant, entered herein on December 15, 1915, by holding and deciding that the defendants were not and that neither of them was in default for failure to file a new or supplemental answer herein.

XIV.

(Original Assignment XXI.)

The said court erred in setting aside, vacating and rescinding said order for a decree pro confesso, on December 20, 1915, by refusing to hold and decide that the defendants were and each of them was in default for failure to answer the amended bill herein.

XV.

(Original Assignment XVI.)

The said court erred in denying complainant's motion for a statement of further and better particulars as to the matters set out in complainant's notice of motion for such statement, contained in the transcript of record of this suit on appeal.

The appellants say:

(a) That the amended bills of complaint contain facts sufficient to constitute a valid cause of action in equity in the federal courts under the California Statutes, Sections 738, 379 and 380, Code of Civil Procedure;

(b) That no allegation of privity or community of interest between co-defendants is necessary in a suit under the state statute;

(c) That the suits are maintainable in equity against the appellee Central Pacific Railway Company, out of possession, by appellants, also out of possession, and that as between appellants and said appellee it is immaterial whether or not the land is occupied or unoccupied inasmuch as, both parties being out of possession, there can be no remedy in an action at law by appellants against this appellee;

(d) That the only limitation ever placed by federal courts upon the enforcement of state statutes, enlarging equitable rights, has been that suits under such statutes should not be enforced in federal courts in cases where complainants have a plain, adequate and complete remedy in an action at law, and the parties consequently are entitled to a trial by jury;

(e) That the appellants have not a plain remedy in ejectment against the appellee Southern Pacific Company because it is alleged that said company is in possession as a public service corporation;

(f) That appellants have not an adequate and complete remedy in an action in damages against said Southern Pacific Company because damages for the taking of the land is not adequate or complete as a substitute for the rights of ownership in real property, and that under the allegations of the amended bills appellants should not be required to accept damages unless the land involved be necessary to the exclusive use of appellee Southern Pacific Company as a public service corporation, and that they are entitled to test the question of the necessity for the taking and are not compelled to admit the necessity and sue in damages;

(g) That the rights of all parties to the suits can be determined only in a suit in equity under the statutory provisions above referred to.

Authorities.

Sections 738, 379 and 380 of the Code of Civil Procedure of California provide:

> "Section 738. An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim," and other provisions irrelevant.
>
> "Section 379. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a

necessary party to a complete determination or settlement of the question involved therein," and other provisions irrelevant.

"Section 380. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed."

CAUSES UNDER SUCH STATUTES ARE SUITS IN EQUITY PER SE.

"Bills *quia timet,* such as the present, belong to the ancient jurisdiction in equity."

McConihay v. Wright, 121 U. S. 201; 30 L. ed. 932.*

"It has ever been held that a cause for removing cloud from title, or quieting title, or by way of bill of peace, is equitable, and appeals to a court of equitable cognizance."

Pacific Coal & Transportation Company v. Pioneer M. Co., 205 Fed. 579.

STATE STATUTES ENLARGING EQUITABLE RIGHTS ARE ENFORCEABLE IN FEDERAL COURTS.

That Federal Courts will enforce new equitable rights, conferred by state statutes, was first announced in Clark v. Smith, 13 Pet. 195; 10 L. ed. 123. The principle there announced has been applied or recognized

* Table of all cases cited begins at page 151 herein.

in many cases since. The state statute alone has been held to be sufficient ground for the exercise of equitable jurisdiction, but in some cases, under such statutes, jurisdiction has been declined on account of the existence, in favor of complainants, of a plain, adequate and complete remedy at law and for the reason that defendants have been entitled in such cases to a trial by jury. The tendency of decisions, however, has been toward exercising jurisdiction in suits brought under such statutes, as is clearly indicated by the following authorities:

Clark v. Smith, 13 Pet. 195; 10 L. ed. 123;
Cummings v. Bank, 101 U. S. 153; 25 L. ed. 903;
Chapman v. Brewer, 114 U. S. 158; 29 L. ed. 83;
Land & River Co. v. Bardon, 45 Fed. 706;
Same, 157 U. S. 327; 39 L. ed. 19;
Reynolds v. Crawfordsville Bank, 112 U. S. 405; 28 L. ed. 735;
Rich v. Braxton, 158 U. S. 375; 39 L. ed. 1022, 1032;
Grether v. Wright, 75 Fed. 742;
Darragh v. H. Wetter Mfg. Co., 78 Fed. 11;
Prentice v. Duluth, etc., 58 Fed. 441;
Southern Pacific Rd. Co. v. Stanley, 49 Fed. 265;
Book v. Justice, etc., 58 Fed. 830;
Harding v. Guice, 80 Fed. 164;
Pacific Coal & Transportation Co. v. Pioneer M. Co., 205 Fed. 577 (580).

It is unnecessary to quote from the leading case, Clark v. Smith, supra, for the reason that subsequent decisions, from which we shall quote, following the reas-

oning of that case, analyze and quote the pertinent portions of it.

In Reynolds v. Crawfordsville Bank, supra, it is said:

> "It may be conceded that the legislature of a state cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless, an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the states. Case of Broderick's Will, 21 Wall. 520 (88 U. S., XXII, 605). And although a state law cannot give jurisdiction to any federal court, yet it may give a substantial right, of such a character that, when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, admiralty or of common law. Ex parte McNiel, 13 Wall. 243 (80 U. S. XX, 626).
>
> "Where, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title, which a court of equity would undertake to remove, we may yet look to the legislation of the state in which the court sits, to ascertain what constitutes a cloud upon the title; and what the state laws declare to be such the courts of the United States, sitting in equity, have jurisdiction to remove. This was expressly held in the case of Clark v. Smith, 13 Pet. 202, where it was said by this court:
>
> > 'Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature.'
>
> "The State of Indiana, where the present case arose, has declared by statute what kind of a claim against real estate is such a cloud upon the title

as will support a suit to remove it. Section 1070 of the Revised Statutes of Indiana, of the year 1881, provides as follows:

> 'An action may be brought by any person either in or out of possession, or by anyone having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of the title.'

"This Act confers upon anyone, against whom *another, whether in or out of possession,** claims an adverse title or interest in real estate, the substantial right of having the disputed title settled by action in the courts.

"Under this statute, it has been decided by the Supreme Court of Indiana that it is sufficient to aver that the defendant claims some interest or title, or pretended interest or title, adverse to complainant without stating what the title is. Marot v. Building Asso., 54 Ind. 37; R. R. Co. v. Oyler, 60 Ind. 383.

"The bill of complainant in this case complies with this rule by averring that 'Said Reynolds is, under his deed' from Baird, the assignee, 'claiming and asserting title paramount to the title of this complainant,' and the answer of the defendant admits that, under the deed executed to him by Baird, he is claiming whatever title to said lands the same confers on him.

"The question whether, under such a statute as that of Indiana and under the facts stated, the circuit court had jurisdiction to render the decree complained of, has been, in effect, decided in the affirmative by this court in the case of Holland v. Challen (ante, 52).

"In that case, a statute of Nebraska was under review, which provided that 'An action may be

*All italics in this brief are ours.

brought and prosecuted to final decree by any person, whether in actual possession or not, claiming title to real estate against any person who claims an adverse interest therein, for the purpose of determining such interest and quieting title'. The court, speaking by Mr. Justice Field, declared in substance that this statute dispensed with the general rule of courts of equity, that, in order to maintain a bill to quiet title, it was necessary that the party should be in possession and, in most cases, that his title should be established at law or founded on undisputed evidence or long continued possession.

"If the equity courts of the United States in Nebraska could dispense with these well established rules of equity, and administer the rights conferred by this statute, it is not open to question that, in this case, the circuit court could disregard a similar rule and entertain jurisdiction of the appellee's case and accord to him the rights conferred by the statute law, even though the deed which the appellant claimed was void on its face.

"As the same authorizes the court to take cognizance of the case, *even when the title of defendant amounts to more than a mere cloud,* and applies in every case when the defendant claims an adverse interest in or title to the property in controversy, it is clear that the assignment of error under consideration has no support."

In Land and River Imp. Co. v. Bardon, 45 Fed. 706, it is said:

"This suit in equity is brought under a provision of the statute of Wisconsin (section 3186), the complainant being in possession of land, to bar the title of the former owner, and compel him to release. The provision is this:

'Any person having the possession and legal title to land may institute an action against any other person setting up a claim thereto, and, if

the plaintiff shall be able to substantiate his title to such land, the defendant shall be adjudged to release to the plaintiff all claim thereto, and to pay the costs of such action, unless the defendant shall, by answer, disclaim all title to such land, and give a release thereof to the plaintiff, in which case he shall recover costs, unless the court shall otherwise order. It shall be sufficient to aver in the complaint in such action the nature and extent of the plaintiff's estate in such land, describing it as accurately as may be, and that he is in possession thereof, and that the defendant makes some claim thereto, and to demand judgment that the plaintiff's claim be established against any claim of the defendant, and that he be forever barred against having or claiming any right or title to the land adverse to the plaintiff,' etc.

"There can be no doubt that this statute constitutes a considerable enlargement of the ordinary equitable action to quiet title to land and to remove a cloud; and it is seriously contended by the defendant that the remedy so provided cannot be available to suitors in these courts, being an innovation upon the settled rules of equity jurisdiction in such cases. But this contention can hardly be sustained. It is well settled that where the statute of a state enlarges a remedy in equity, or creates a new one, not inconsistent with the fundamental principles of equity jurisprudence, such remedy is open to suitors in the United States as well as in the state courts. This question was decided by the United States Supreme Court in Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 495, under a similar statute in Nebraska. Indeed the Nebraska law was a much greater innovation than the statute in question, as it gave the action to the supposed owner whether in actual possession or not; thus, in a large degree, taking the place of an action of ejectment. Again in Reynolds v. Bank, 112 U. S. 405; 5 Sup. Ct. Rep. 213. In the last case a Michigan statute came in

question of the same tenor and substance as the one under which this suit is brought."

The foregoing suit was taken to the United States Supreme Court; the decree was affirmed and from the opinion we quote:

"We remarked in Gormley v. Clark, 134 U. S. 338, 348 [33; 909, 913] that while the rule was well settled that remedies in the courts of the United States at common law or in equity, according to the essential character of the case, are uncontrolled in that particular by the practice of the state courts, yet an enlargement of equitable rights by state statutes may be administered by the circuit courts of the United States, as well as by the courts of the state; and when the case is one of a remedial proceeding, *essentially of an equitable character,* there can be no objection to the exercise of the jurisdiction. Kieley v. McGlynn, 88 U. S. 21 Wall. 503, 520 (22: 599, 605); Holland v. Challen, 110 U. S. 15, 25 (28: 52, 56); Frost v. Spitley, 121 U. S. 552, 557 (30: 1010, 1012).

"Notwithstanding the statute may have enlarged the ordinary equitable action to quiet title and to remove a cloud, the circuit court had jurisdiction to award the relief prayed *if the bill were properly brought under the section in question.*"

Bardon v. Land & River Improvement Company, 157 U. S. 327; 39 L. ed. 720.

Darragh v. H. Wetter Mfg. Co., supra, contains a thorough review of authorities upon the point under consideration. The whole opinion is instructive, yet we shall quote only the following:

"In Clark v. Smith, 13 Pet. 195, 202, a suit in equity in the federal court, under a state statute, was maintained by a party in possession of real estate to cancel a junior patent, although this stat-

tute dispensed with the rule in equity that the title of the complainant must first be established at law. In Holland v. Challen, 110 U. S. 15, 25; 3 Sup. Ct. 495, a bill to quiet title to land in Nebraska, brought in the federal court by a complainant out of possession, was maintained under a statute of that state, although that statute dispensed with the equity rule that one must have established his title at law, and must be in possession, in order to maintain such a suit. In Cummings v. Bank, 101 U. S. 153, 157, the statute of a state had given to property holders the right to enjoin the payment of an illegal tax; and, in discussing the right of the complainant to maintain a suit in the national courts for that purpose, Mr. Justice Miller said:

> 'We have also held that, where a statute of a state created a new right or provided a new remedy, the federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires.'

"In Gormley v. Clark, 134 U. S. 338, 348, 10 Sup. Ct. 554, the supreme court sustained a suit in equity brought in the federal court under chapter 116, Rev. St. Ill., commonly called the 'Burnt Records Act', by one out of possession of real estate, to establish his title, *and to recover the possession of the property of the defendant,* and granted the relief he sought, *notwithstanding the earlier decision in Whitehead v. Shattuck.* In this case the Supreme Court again declared that:

> 'An enlargement of equitable rights by state statute may be administered by the circuit courts of the United States as well as by the courts of the state, and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction.'

"Finally, in Cowley v. Railroad Co., 159 U. S. 569, 582, 16 Sup. Ct. 127, a case is reported in which

a suit had been brought in one of the courts of Washington Territory to set aside a judgment of that court, for fraud, under a territorial statute which authorized the territorial court to vacate its judgments in original suits of this character brought for that purpose. The suit was transferred to the federal court, and there tried, but the circuit court dismissed the bill on the ground that it was not according to equity practice to vacate or act directly upon a judgment at law, that the complainant should have applied by petition or motion to set aside the judgment in the original cause, and that his remedy at law was plain and adequate. The supreme court reversed that decree. Mr. Justice Brown delivered the unanimous opinion of the court, in which he announces the same rules and cites the same authorities which he had so vigorously presented in his dissenting opinion in Cates v. Allen, 149 U. S. 451, 461, 13 Sup. Ct. 883, 977. In speaking of this suit, he said:

> '*Even if it were treated as in form a bill in equity, the right of the complainant would be gauged as well by the statute under which the bill was filed as by the general rules of equity jurisprudence.* * * * While the federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, *it remains,* in substance, *a proceeding under the statute,* with the original rights of the parties unchanged.'

"Upon a careful review of all these authorities and especially in view of the decisions in the last two cases to which we have adverted, it may, we think, be safely said that the following rules relative to the jurisdiction and power of the federal courts to enforce rights created, and to administer remedies provided, by state statutes for enforcement and administration in the courts of the states, have been firmly established in the jurisprudence of the United States; *Rights, created or provided by the statutes of the states to be pursued in the*

state courts may be enforced and administered in the federal courts, either at law, in equity, or in admiralty, as the nature of the new rights may require. Ex parte McNiel, 13 Wall. 236; Cummings v. Bank, 101 U. S. 153, 157; Trust Co. v. Krumseig (decided by this court at May term, 1896) 77 Fed. 32. *An enlargement of equitable rights* by the statutes of the states *may be administered by the national courts* as well as by the courts of the states. Case of Broderick's Will, 21 Wall. 503, 520; Clark v. Smith, 13 Pet. 195, 202; Holland v. Challen, 110 U. S. 15, 25, 3 Sup. Ct. 495; Frost v. Spitley, 121 U. S. 552, 557, 7 Sup. Ct. 1129; Reynolds v. Bank, 112 U. S. 405, 5 Sup. Ct. 213; Chapman v. Brewer, 114 U. S. 158, 170, 171, 5 Sup. Ct. 799; Gormley v. Clark, 134 U. S. 338, 348, 349, 10 Sup. Ct. 554; Bardon v. Improvement Co., 157 U. S. 327, 330, 15 Sup. Ct. 650; Cowley v. Railroad Co., 159 U. S. 569, 583, 16 Sup. Ct. 127.

> *'A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality.'* Ex parte McNeil, 13 Wall. 236; Davis v. Gray, 16 Wall. 203, 221; Cowley v. Railroad Co., 159 U. S. 569, 583, 16 Sup. Ct. 127."

In Rich v. Braxton, supra, it it held:

> "Upon the question of the jurisdiction of a court of equity to give the relief sought by the bill, but little need be said.
>
> "In Simpson v. Edmiston, 23 W. Va. 675, 678, the court said that it had been repeatedly held that a court of equity has jurisdiction to set aside an illegal tax deed—citing Forqueran v. Donnally, 7 W. Va. 114; Jones v. Dils, 18 W. Va. 759; and Orr v. Wiley, 19 W. Va. 150. And in Danser v. Johnsons, 25 W. Va. 380, 387:
>
> > 'It is fully settled in this state that a court of equity has jurisdiction to set aside a void tax deed.'

"*These authorities make it clear that if this case had remained in the state court no objection could have been made to the form of suit.* But as the jurisdiction of the courts of the United States, sitting in equity, cannot be controlled by the laws of the states or the decisions of the state courts—except that the courts of the United States, sitting in equity, may enforce new rights of an *equitable nature created by such laws,* Clark v. Smith, 38 U. S. 13 Pet. 195 (10: 123); Holland v. Challen, 110 U. S. 15 (28: 52). *It is proper to say that, according to settled principles, the plaintiffs were entitled to invoke the aid of a court of equity.*

"The principal ground upon which the contrary view is rested by the appellants is, that the bill assails the tax deeds under which they claim as fraudulent, void, and inoperative. And to support this view several adjudged cases are cited, some of which hold that where the title is merely legal, and where the validity of one title or the invalidity of another clearly appears on the face of documents that are accessible, and no particular circumstances are stated, showing the necessity for interference by equity, either for preventing suits or other vexation, the remedy is at law. Hipp v. Babin, 60 U. S. 19 How. 271 (15: 633); Whitehead v. Shattuck, 138 U. S. 146, 156 (34: 873, 876); Scott v. Neely, 140 U. S. 106, 110 (35: 358, 360); Smyth v. New Orleans Canal & Bkg. Co., 141 U. S. 656, 660 (35: 891, 892). The principle is thus stated by Mr. Justice Story:

> 'Where the illegality of the agreement, deed, or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity to direct it to be canceled or delivered up, would not seem to apply; for, in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defense; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a

> means of vexatious litigation, or serious injury.' 1 Eq. Jur., Sec. 700a.
>
> "These authorities do not control the present question. It must be remembered that
>
> 'it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' Boyce v. Grundy, 28 U. S. 3 Pet. 210, 215 (7: 655, 657); Drexel v. Berney, 122 U. S. 241, 252 (30: 1219, 1222); Allen v. Hanks, 136 U. S. 300, 311 (34: 414, 418). *And the applicability of the rule depends upon the circumstances of each case.* Watson v. Sutherland, 72 U. S. 5 Wall. 74, 79 (18: 580, 582)."

The principle here considered has been before this court (9th Circuit) a number of times and in the fairly recent case of Pacific Coal and Tis. Co. v. Pioneer M. Co., supra, this court, through Judge Wolverton said, in considering the Alaska statute provided for quieting title, that, if the complainant bring himself "well within the statute, there can scarcely remain a doubt as to the jurisdiction in equity".

This court points out clearly in the case last cited, that such statutes as the California Statutes will be enforced in the federal courts, whenever a complainant has no plain, adequate and complete remedy in an action at law and that the only ground upon which jurisdiction in equity may be properly declined is a deprivation of a defendant of his right to a trial by jury.

The foregoing authorities show a tendency on the part of federal courts generally toward the exercise of jurisdiction in equity over suits brought under state

statutes which enlarge the class of complainants who may avail themselves of the equitable right touching the subject covered by the statute.

We come now to consider whether the complainants have brought themselves within the California Statutes.

THE AMENDED BILLS OF COMPLAINT CONTAIN A STATEMENT OF FACTS SUFFICIENT TO CONSTITUTE A VALID CAUSE OF ACTION UNDER THE CALIFORNIA STATUTES, SECTIONS 738, 379 AND 380, CODE OF CIVIL PROCEDURE.

In concise terms each of the bills alleges that complainant is the owner in fee, that the defendants and each of them assert a claim to the land involved which is adverse to complainant and without right.

> "Hereafter it shall be sufficient that a bill in equity shall contain * * * a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."
>
> Equity Rule 25.

Ely v. New Mexico and Arizona Railroad Company, 129 U. S. 291; 32 L. ed. 688, 690, was a proceeding to quiet title under a statute identical with the California Statute; with reference to the sufficiency of statement of facts in the bill it was said:

> "By the Act of the Territory of 1881, chap. 59, that statute is amended by striking out the requirement of the plaintiff's possession, so as to read as follows:
>
> 'An action may be brought by any person against another who claims an estate or interest

in said real property adverse to him, for the purpose of determining such adverse claim.'

"The manifest intent of the statute, as thus amended, is, that any person owning real property, whether in possession or not, in which any other person claims an adverse title or interest, may bring an action against him to determine the adverse claim and to quiet the plaintiff's title. *It extends to cases in which the plaintiff is out of possession and the defendant is in possession,* and in which, at common law, the plaintiff might have maintained ejectment. An allegation, in ordinary and concise terms, of the ultimate fact, that the plaintiff is the owner in fee, is sufficient, without setting out matters of evidence, or what have been sometimes called probative facts, which go to establish that ultimate fact; and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate or interest which he claims, the nature of which must be known to him, and may not be known to the plaintiff.

"These conclusions accord with the decisions of the Courts of California and Indiana under similar statutes, from one of which the present Statute of Arizona would seem to have been taken."

Section 738, C. C. P. of Cal., was before the United States Supreme Court in More v. Steinbach, 127 U. S. 70; 32 L. ed. 51, 56. From that case we extract the following:

"Second, as to the want of any allegation in the complaint of possession by the plaintiffs, or any evidence of that fact in the proofs, it is sufficient to say that, by section 738 of Code of Civil Procedure of California, a plaintiff asserting title to lands, though out of possession, may maintain an action to determine an adverse claim, estate, or in-

terest in the premises. People v. Center, 66 Cal. 551. A statute of Nebraska, authorizing a similar suit by a plaintiff out of possession, was before this court for consideration in Holland v. Challen, 110 U. S. 15 (28: 52), and the jurisdiction of a court of equity to grant the relief prayed in such case was sustained. See also Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 411 (28: 733, 736); Chapman v. Brewer, 114 U. S. 158, 170, 171 (20: 83, 87, 88); U. S. v. Wilson, 118 U. S. 86, 89 (30: 110, 112); Frost v. Spitley, 121 U. S. 552 (30: 1010, 1012)."

The allegations necessary or proper in a proceeding under Section 738 were again discussed in Devine v. Los Angeles, 202 U. S. 313, 333-334; 50 L. ed. 1046, 1053, where it is said:

"It seems, that it has often been held by the supreme court of California, that, in an action under this section, it is not necessary that the complaint should allege the nature of the estate or interest claimed by the defendant. Head v. Fordyce, 17 Cal. 151; Castro v. Barry, 79 Cal. 443, 21 Pac. 946; Bulwer Consol. Min. Co. v. Standard Consol. Min. Co., 83 Cal. 589, 23 Pac. 1102.

"We are dealing with the question of the jurisdiction of the circuit court, and the general rule as to that is thus stated by Mr. Justice Peckham, speaking for the court, in Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co., supra [188 U. S. 632; 47 L. ed. 626].

'It would be wholly unnecessary and improper, in order to prove complainant's cause of action, to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer

to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading, so far as we are aware, and is improper.

'The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defense is.' ''

The allegations required of a plaintiff, proceeding under Section 738, are set out in People v. Center, 66 Cal. 551, 562, from which we quote:

''In an action under section 738 of the Code of Civil Procedure, it is not necessary to allege in the complaint the nature of the estate or interest claimed by the defendant. (Crook v. Forsyth, supra.) * * * A proceeding by which one may compel another to expose and have adjudicated the nature of the interest on which he is asserting an adverse claim against the estate of the former, is one to be conducted in a court of equity. The discovery of the nature of the adverse claim precedes its adjudication. * * *

''Section 738 of the Code of Civil Procedure allows an action to be brought by any person against another who claims an estate or interest adverse to him. Its language is very broad. *If the plaintiff is out and the defendant is in possession, nevertheless the action can be maintained.* * * * In the case at bar, the defendants appealing averred in their answer that they were in possession of the lands when the action was commenced. The court did not find upon that averment, and the defendants did not complain of the omission. But the omission is immaterial, because the action is maintainable whether they were or were not in possession.''

And it is further said in Castro v. Barry, 79 Cal. 443, that:

> "The complaint in this case alleged in substance that the plaintiff was the owner of certain real property; that the defendant claimed an interest therein adverse to the plaintiff; that such claim was without right, and that the defendant had no right, title, or interest whatever in the property. There were other allegations which will be noticed below. The prayer was, that defendant be required to set forth the nature of his claim, that it be adjudged to be void, and that defendant be enjoined from asserting it. * * *
>
> "The pleading is very simple. And it is well settled that the allegations above mentioned are sufficient. (Rough v. Simmons, 65 Cal. 227; Hesser v. Miller, 77 Cal. 192.)"

The amended bills of complaint contain all allegations necessary in a suit in the state courts and, doing so "there can scarcely remain a doubt of his (appellants') right to proceed in equity" in the federal courts.

> Pacific Coal and Trans. Co. v. Pioneer M. Co., 205 Fed. 580.

Nor is the effect of the statutory allegations of the bills destroyed or impaired by other allegations in the bills as to the character of the defendant corporations, but such additional allegations merely aid in showing the equity jurisdiction of the court, not going at all to the cause of action itself. Such appears from the authorities cited under the two heads next following.

As to the Central Pacific Railway Company it was held by the lower court that said defendant, out of possession, may not be joined with the defendant Southern

Pacific Company, in possession, as co-defendants in a suit to quiet title under the state statute without alleging a privity or community of interest between such co-defendants. Appellants say that in such suits there may be joined as co-defendants all parties who, without right, make any adverse claim to the property involved—without regard to the question of possession and without regard to whether a privity or community of interest is alleged or exists in fact between such co-defendants, and that the only limitation which federal courts have ever placed upon their sustaining such suits brought under said statutes has been that a defendant should not be deprived of his right to trial by jury if a plain, adequate and complete remedy in an action at law exists in favor of the complainant. In such suits it is common knowledge, gained from an inspection of records of proceedings under Section 738 and similar sections from other jurisdictions, that it is most common to make the Doe family parties defendant without any thought of privity of interest existing between co-defendants or the existence of any fact other than the assertion on the part of the defendants of an adverse claim without right.

WHERE A BILL OF COMPLAINT IN A SUIT IN EQUITY IN A FEDERAL COURT CONTAINS THE ALLEGATIONS WHICH ARE REQUIRED OF A PLAINTIFF SUING IN A STATE COURT, FEDERAL COURTS WILL TAKE JURISDICTION AND ADMINISTER SUCH RELIEF AS MIGHT BE GRANTED IN A STATE COURT.

In a suit under the Wyoming Statute, corresponding, but not entirely similar, to the California Statute, it was held in Gillis v. Downey, 85 Fed. 483, 488, that:

"Under this statute the supreme court of the state has held that a petition is sufficient which contains a general allegation that the petitioner is in the actual possession of the described premises, and that the defendant claims an estate or interest therein adverse to him. Durell v. Abbott, 44 Pac. 647. This action, therefore, could have been brought in the state court on a petition containing such allegations as the above case. And, where the requisite diverse citizenship exists, the action may be brought in the United States court, predicated of the local statute. Gaines v. Fuentes, 92 U. S. 10; Dennick v. Railroad Co., 103 U. S. 11; Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263; Chicot Co. v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695; Cowley v. Railroad Co., 159 U. S. 569, 16 Sup. Ct. 127. This is equally true in suits to quiet title. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495; Greeley v. Lowe, 155 U. S. 75, 15 Sup. Ct. 24; Harding v. Guice, 25 C. C. A. 352, 80 Fed. 162; Perego v. Dodge, 163 U. S. 165, 16 Sup. Ct. 971. As a suit to quiet title pertains to the inherent jurisdiction of courts of equity, it was competent for complainant to bring his action on the chancery side of the court. The statutory form of procedure is in aid and not exclusive of the right to proceed in equity."

The California Statutes and decisions cited hereinabove show that the position of the parties to these suits, relative to the occupancy of the land is utterly immaterial, and that in a suit in the state courts no privity of interest would be required to exist or to be alleged. Such being the state law, by statute and decision, the same will be followed by federal courts.

In Harding v. Guice, 80 Fed. 162, 164, it is said:

"The court of last resort of the State of West Virginia having construed its statutes so that a bill

> to remove a cloud upon a title can be brought by one out of possession, * * * this construction will control this court."

The oft quoted case of Holland v. Challen, 110 U. S. 15; 28 L. ed. 52, was a suit to quiet title, under the Nebraska Statute, in which the enlarged right of complainant, out of possession, was enforced. In that case it is said that state policy influences federal courts to administer the enlarged right in the same form as it may be pursued in the state court. The language of that case follows:

> " 'The state legislatures', the court added, 'certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States, but *having created a right and at the same time prescribed the remedy to enforce it,* if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, *no reason exists why it should not be pursued in the same form as in the state court; on the contrary, propriety and convenience suggest that the practice should not materially differ where titles to lands are the subjects of investigation.* And such is the constant course of the federal courts.' The opinion concludes with the observation: 'That, when investigating and decreeing on titles in this country, we must deal with them in practice as we find them and accommodate our modes of proceeding, in a considerable degree, to the nature of the case and the character of the equities involved in the controversy, so as *to give effect to state legislation* and state policy'."

In California Oil and Gas Company v. Miller, 96 Fed 20, Judge Wellborn said:

> "Assuming that complainant in the present suit relies on sections 738 and 739 of the Code of Civil

> Procedure of California, the above-quoted decisions from the supreme court of said state, construing said sections are binding on this court (Fost. Fed. Prac. Sec. 375, and notes; Nobles v. Georgia, 168 U. S. 398, 18 Sup. Ct. 87), and I make the assumption indicated for the reason that equitable remedies given by the statutes of a state may be administered, under certain circumstances, in a federal court (Davidson v. Calkins, 92 Fed. 230; Clark v. Smith, 13 Pet. 195; Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 899; Bardon v. Improvement Co., 157 U. S. 327, 15 Sup. Ct. 650)."

There clearly appears to be no valid objection to joining the defendant Central Pacific Railway Company out of possession, with the defendant Southern Pacific Company, in possession, without showing any privity between them or otherwise charging them than with the making of an adverse claim without right. And of course it follows that if a defendant, *in possession,* may be joined with a defendant, *out of possession,* by a plaintiff, also out of possession (C. C. P., 380) it is not required, in order to sue a defendant, out of possession, that the land be unoccupied or vacant.

The question of possession has been a question for consideration in suits to quiet title in the federal courts only because of its easily indicating whether a complainant has a plain and adequate remedy at law.

In Wehrman v. Conklin, 155 U. S. 314; 39 L. ed. 167, 172, such statutes received a most thorough consideration and the authorities were fully reviewed. In the opinion the Court said:

> "These statutes have generally been held to be within the constitutional power of the legislature;

but the question still remains, *to what extent will they be enforced* in the federal courts, and how far are they *subservient to the constitutional provision entitling parties to a trial by jury,* and to the express provision of Revised Statutes, section 723, inhibiting suits in equity in any case where a plain, complete, and adequate remedy may be had at law. These provisions are obligatory at all times and under all circumstances, and are applicable to every form of action, the laws of the several states to the contrary notwithstanding. Section 723 has never been regarded, however, as anything more than declaratory of the existing law (Boyce v. Grundy, 28 U. S. 3 Pet. 210 (7: 655), and as was held in New York Guaranty & I. Co. v. Memphis Water Co., 107 U. S. 205, 210 (27: 484, 486), 'was intended to emphasize the rule, and to impress it upon the attention of the courts.' It was not intended to restrict the ancient jurisdiction of courts of equity, or to prohibit their exercise of a concurrent jurisdiction with courts of law in cases where such concurrent jurisdiction had been previously upheld.

"The question of enforcing these state statutes was first considered in Clark v. Smith, 38 U. S. 13 Pet. 195 (10: 123), in which a bill was filed by a party in possession to compel the defendant to release a pretended title to certain lands claimed by him under patents from the state of Kentucky. The conveyance asked by the bill was sought to be in conformity with the provisions of an act of the assembly of Kentucky giving jurisdiction to courts of equity in such cases. It was held that the legislature

> 'having created a right, and having at the same time prescribed the remedy to enforce it, if the remedy prescribed is consistent with the ordinary modes of procedure on the chancery side of the federal courts, *no reason exists why it should not be pursued in the same form as in the state courts.* On the contrary, propriety and con-

venience suggest that the practice should not materially differ, where titles to land are the subjects of investigation.'

"This case was cited and approved in Parker v. Overman, 59 U. S. 18 How. 137 (15: 318), where a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff, was held to be enforceable in the federal courts. In Holland v. Challen, 110 U. S. 15 (28: 52), the principle of this case was extended to one of wild land, of which neither plaintiff nor defendant was in possession. Plaintiff claimed under a tax title, and the property was described in the bill as unoccupied, wild, uncultivated land. *The question was elaborately examined, and the jurisdiction sustained upon the ground that an enlargement of equitable rights by state statutes may be administered in the federal courts as well as in the courts of the state, citing Clark v. Smith, supra,* and *Re Broderick's Will,* 88 U. S. 21 Wall. 520 (22: 605). The case was treated as one where the plaintiff had no remedy at law against the defendant, who claimed an adverse interest in the premises. In delivering the opinion, however, it was intimated, page 25, that if a suit were brought in the Federal Court under the Nebraska Statute, against a party in possession,

'there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such case we are speaking.'

"Another step in the same direction was taken in Reynolds v. First Nat. Bank of Crawfordsville, 112 U. S. 405 (28: 733), in which a bill was sustained upon an equitable title, although it would appear from the report of the case that such title was not fortified by an actual possession: and in Chapman v. Brewer, 114 U. S. 158 (29: 83), a similar suit was upheld under a statute of Michigan permitting bills to quiet title to be filed by any person in possession.

"Subsequent cases, however, denied the power of the federal courts to afford relief under such statutes where the complainant was not in possession of the land, and in Whitehead v. Shattuck, 138 U. S. 146 (34: 873), particularly, it was held that, where the proceeding is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.

'The right which in this case the plaintiff wishes to assert, is his title to certain real property; and the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title *both parties have a constitutional right to call for a jury.*'

"The case of Holland v. Challen was distinguished as one where neither party was in possession of property, and it was further said that in the case of Reynolds v. First Nat. Bank of Crawfordsville, the question did not arise as to whether the plaintiff had a remedy at law, but whether a suit to remove the cloud mentioned would lie in a Federal Court. The case of United States v. Wilson, 118 U. S. 86 (30: 110), was really to the same effect, though not cited in Whitehead v. Shattuck. See also Frost v. Spitley, 121 U. S. 552 (30: 1010). But nothing was said in either of these cases to disturb the harmony of the previous cases.

"The real question, then, to be determined in this case is, whether the plaintiffs have an adequate remedy at law."

Additional authorities to the effect that the question of whether a complainant has a plain, adequate and complete remedy in an action at law is the determining consideration as to jurisdiction in equity should not be necessary. Yet we shall quote the following brief, terse

statement in Thompson v. Railroad Company in 6 Wall. 134; 18 L. ed. 765, 767:

> "Absence of a plain and adequate remedy at law is the only test of equity jurisdiction."

SUCH A REMEDY BEING THE TEST WE COME TO ASK WHETHER, IN A CASE WHERE AN OWNER IS OUT OF POSSESSION, AND A PARTY MAKING AN ADVERSE CLAIM IS ALSO OUT OF POSSESSION, IT IS, IN ANY WAY, MATERIAL BETWEEN THOSE PARTIES WHETHER THE LAND INVOLVED BE OCCUPIED BY A THIRD PARTY OR BE "VACANT AND UNOCCUPIED". IN EITHER EVENT WHAT REMEDY AT LAW HAS THE OWNER AGAINST SUCH CLAIMANT?

The lower court held that the amended bills affirmatively show lack of jurisdiction in equity in a federal court because of the allegation that the land involved is occupied land and not vacant land, it being the contention of the defendants, and the holding of the lower court, that in a case where neither complainant nor defendant is in possession the complainant may not sue under the statute, if a third party be in possession, and this appellants assign as error.

Under the statute a complainant may sue a defendant in possession.

> "If the plaintiff is out and the defendant is in possession, nevertheless, the action can be maintained."
>
> People v. Center, 66 Cal. 551, 562.

A fortiori he may sue a defendant out of possession; no statute even is required to enable the suing of a de-

fendant out of possession. Also a defendant in possession may be sued under the statute (Section 738) with a defendant in possession (Section 380).

Casey v. Leggett, 125 Cal. 664;
Reiner v. Schraeder, 146 Cal. 416;
Landregan v. Peppin, 94 Cal. 465.

Under the state statute a defendant out of possession may be joined with defendants in possession; under the statute, therefore, it conclusively appears that the right of a complainant out of possession to sue is not limited to land vacant and unoccupied and the enlarged right under the statute will be enforced in a federal court where the complainant brings himself by the allegations of his bill "well within the statute" and "there can scarcely remain a doubt of his right to proceed in equity." Pacific Coal and Transportation Co. v. Pioneer M. Co., 205 Fed. 580.

State statutes will be enforced by federal courts in the same form as in state courts where it can be done without violation of the principles they are accustomed to regard in the exercise of their jurisdiction.

Grillis v. Downey, 85 Fed. 488;
Am. Ass'n. v. Williams, 166 Fed. 17;
Grand Rapids & I. R. Co. v. Sparrow, 36 Fed. 210;
Greeley v. Lowe, 155 U. S. 58;
Brusie v. Gates, 80 Cal. 462;
Southern Pacific R. Company v. Stanley, 49 Fed. 263.

"The settled rule of the Supreme Court of the United States seems to be that, independently of

a statute of the state wherein the land lies, a bill to remove a cloud upon the title of a complainant will not lie, where he, the complainant, is not in actual possession of the premises, and that such a bill must show a legal title and actual possession. Only in such circumstances will a bill lie as a bill quia timet to protect and quiet such possession by the cancellation of an instrument which may disturb such possession or cloud the legal title. Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. ed. 1010; Dick v. Foraker, 155 U. S. 404, 414, 415, 15 Sup. Ct. 124, 39 L. ed. 201; United States v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. ed. 110. *But where by a local statute a bill in equity will lie to remove a cloud independently of possession, the enlarged equitable right thus created may be enforced by an equity court of the United States where there exists the requisite diversity of citizenship* or some other ground of federal jurisdiction. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. ed. 52; Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167."

American Ass'n v. Williams, 166 Fed. 20.

In Grand Rapids & I. R. Co. v. Sparrow, 36 Fed. 210 in deciding a case under the Michigan Statute the Court said:

"Respecting the argument that the act of the legislature of Michigan (Laws 1887, No. 260, p. 337) extending the jurisdiction of the court of equity to quiet titles to cases where the lands are unoccupied, is unconstitutional, because it deprives the defendant of the right to a trial by jury, secured by the constitution of Michigan, (article 6, sec. 27), I think it must be held that this constitutional provision extends only to cases where by common law a trial by jury was customary. It does not reach those cases where the remedy is given by statute. At common law, ejectment did not lie where the defendant was not in possession,

and it is sustainable in such a case only by virtue of the statute in Michigan. The objection, therefore, cannot be sustained. Tabor v. Cook, 15 Mich. 322, and cases cited. It is further suggested that the federal court in equity will not take cognizance of such a case, because there is an ample remedy by ejectment at law. But this court will administer the remedies given by local statutes, where it can be done without violation of the principles it is accustomed to regard in the exercise of its jurisdiction. It is argued by the defendant that one of those principles is that the court will not take jurisdiction where there is a plain remedy at law; and it is said that ejectment is such a remedy. But, when the act defining the jurisdiction of the federal courts in equity was passed, and suits were forbidden when a plain, adequate and complete remedy at law existed, (Rev. St. U. S. Sec. 723), it was the remedy furnished by the common law which was thereby intended. Supplementary statutes, giving new legal remedies, do not disturb the original equitable jurisdiction, nor supplant it. *The courts in equity of the United States have undoubted cognizance of bills quia timet when the complainant is in possession. They may also take cognizance where he is not in possession, if local legislation gives the remedy in such a case, and the defendant is not thereby deprived of his right to a jury trial, according to the course of the common law.* According to the case of Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 496, the circumstance of the complainant's being in possession is not essential to the jurisdiction of courts of equity in such cases, and may be dispensed with. That being so, a bill in equity is maintainable, if there was not by common law a plain, adequate and complete remedy. *There was no such remedy where the defendant was out of possession.*"

CONSEQUENTLY, WE COME TO CONSIDER WHETHER POSSESSION BY THE DEFENDANT, SOUTHERN PACIFIC COMPANY, WILL DEFEAT THE JURISDICTION IN EQUITY.

As to that defendant the real question to be determined is (at least was up to the time of adoption of the New Equity Rules), as was stated in Wehrman v. Conklin, supra,

> "whether plaintiffs have an adequate remedy in an action at law".

The same test as to jurisdiction is often expressed in the opinions in language to the effect that the equitable rights given under state statutes will be enforced fully in the federal courts, if by doing so the parties be not deprived of their right to a trial by jury.

In Greeley v. Lowe, 155 U. S. 58; 39 L. ed. 69, 75, we find the following:

> "This court has held in a multitude of cases that where the laws of a particular state gave a remedy in equity, as, for instance, a bill by a party in or out of possession, to quiet title to lands, such remedy will be enforced in the Federal Courts, if it does not infringe upon the constitutional rights of the parties to a trial by jury."

Grether v. Wright, 75 Fed. 742, a case, the logic and clarity of which makes the reading of it in its entirety well worth while, shows the common foundation for the two rules last hereinabove referred to, by saying:

> "*We think this review of the cases justifies the conclusion that the main purpose of section 723 was to emphasize the necessity for preserving to litigants in courts of the United States the right to trial by jury secured by the seventh amendment in suits at common law,* and that, where a state stat-

> ute grants to litigants in its courts an equitable remedy which does not impinge on their right to a trial by jury at common law, courts of the United States, sitting in the state as courts of equity, may grant the same statutory relief as that afforded in the state tribunals. *In such cases, where the right of jury trial is not interfered with, the equitable remedy afforded by the statute of the state is usually so much more complete than the old remedies that the language of section 723 interposes no obstacle to equitable jurisdiction in the federal courts.*"

The fact that the defendant is in possession has no significance other than in being suggestive of a remedy in ejectment; if, however, the defendant is in possession under such circumstances that a complainant has no plain remedy in ejectment nor any other adequate remedy in an action at law, the possession is no obstruction to the maintenance of the suit in equity to quiet the title.

The case usually relied upon by parties objecting to jurisdiction in equity is Whitehead v. Shattuck, 138 U. S. 152; 34 L. ed. 874. Jurisdiction in that case was declined because the defendant was in possession and the bill showed no facts which indicated that the complainant had not a plain, adequate and complete remedy in an action at law. It is there said:

> "The facts set forth in the bill of the plaintiff clearly showed that he has a plain, adequate and complete remedy in an action at law."

In Continental Trust Co. v. Tallassee Falls Mfg. Co., 222 Fed. 694, 702, it is said that the

> "statute is merely declaratory of the well-recognized rule that a suit in equity cannot be sustained

> where there is a plain, adequate, and complete remedy at law. The converse is equally the settled law; that is, *if the plaintiff has a justiciable cause and he has no plain, adequate,* and *complete remedy at law, he must have one in equity.* * * * Of course, the courts have never undertaken to state all the instances where one out of possession can sustain a bill to quiet title. It would be impossible to do this, for the reason that each case must rest upon its own peculiar variety of facts and circumstances. *The question presented in each instance is whether there is a remedy at law, and, if so, whether it is plain, adequate, and complete, in view of all the circumstances and as the merits of the particular case require.* In other words, the test is that the remedy at law, in order to exclude equity jurisdiction, must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Tyler v. Savage, 143 U. S. 95, 12 Sup. Ct. 340, 36 L. ed. 82; Preston v. Sturgis, 183 Fed. 1, 105 C. C. A. 293, 32 L. R. A. (N. S.) 1020."

The Circuit Court of Appeals, in Stuart v. Union Pacific R. R. 178 Fed. 753, 756, says:

> "It is true, generally speaking, that in the courts of the United States a suit to quiet title cannot be maintained by a complainant who is not in possession against a defendant who is in possession, and this is so because there is a plain, complete and adequate remedy at law, * * * but *it is also true that in exceptional cases,* where there is no such remedy at law, *the general rule does not apply.*"

It appears, therefore, that suits to quiet title, as to jurisdiction of the federal courts over them, are subject to the same general principles which control in other suits. The test as to whether jurisdiction exists

on the equity side is not in reality whether a complainant is in possession, nor whether defendants are out of possession, but *whether the complainant has a plain, complete and adequate remedy in an action at law.*

> "If the controversy be one in which a Court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."
>
> Holland v. Challen, 110 U. S. 15; 28 L. ed. 52, 56.

An allegation, as to possession, in a suit in the federal courts is necessary only in so far as it is needed in order to show whether the complainant has a plain and adequate remedy in an action at law; as to being essential in order to state a valid cause of action in equity under the statute, it is no more essential in the federal courts than it is in a state court.

> "This action, therefore, could have been brought in the state court on a petition containing such allegations as the above case. And, where the requisite diverse citizenship exists, the action may be brought in the United States court, predicated on the local statute."
>
> Gillis v. Downey, 85 Fed. 483, 488.

> "Under the old practice act a party out of possession could not maintain an action to quiet title to real estate. (Practice Act, sec. 254; San Francisco v. Beideman, 17 Cal. 461; Rico v. Spence, 21 Cal. 504.) *But the present code gives the right to prosecute the action, generally, without reference to the question of possession.* (Code Civ. Proc., secs. 380, 738; People v. Center 66, Cal. 551.) Counsel for appellant concede this to be so, but claim that under sections 318 and 319 of the Code

> of Civil Procedure the plaintiff must at least show that he has been in possession of the land within a period of five years. But in our judgment the sections referred to do not apply to actions of this kind. (Richardson v. Williamson, 24 Cal. 299); and if they did, they are statutes of limitation, and do not affect the question of pleading raised here. It was not necessary for the respondent to show in his complaint that his cause of action was not barred by the statute of limitations. It not appearing on the face of the complaint that the action was barred, the question could only be presented by answer."
>
> Brusie v. Gates, 80 Cal. 465.

Appellees rely upon Whitehead v. Shattuck, 138 U. S. 146 (34 L. ed. 873), and Southern Pacific R. Co. v. Goodrich, 57 Fed. 879; in neither of these cases did the bill contain any allegation which tended to show that the complainant did not have a plain, complete and adequate remedy in ejectment, and it was upon that ground that the court held that it was without jurisdiction; that such is the fact is pointed out in New Jersey, etc. v. Gardner-Lacy Lumber Co., 178 Fed. 772, 779, where it is said:

> "While in *Whitehead v. Shattuck* the bill was dismissed because it appeared upon its face that the defendant was in possession and the plaintiff had a complete, adequate remedy at law."

In passing upon the question of jurisdiction in Whitehead v. Shattuck, the court recognized that in a suit to quiet title, no hard and fast rule could be laid down. Judge Field there said:

> "It would be difficult and perhaps impossible to state any general rule which would determine

in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other."

FEDERAL COURTS HAVE TAKEN JURISDICTION IN SUITS TO QUIET TITLE UNDER STATE STATUTES WHENEVER ANY ELEMENT HAS ENTERED INTO THE CONTROVERSY WHICH WOULD RENDER REMEDY THROUGH AN ACTION AT LAW INADEQUATE.

"If complainants show an independent right to equitable relief such as will authorize equitable jurisdiction, the prayer to quiet title will be entertained, *even though they are not in possession.* The rule that a bill to quiet title will *not* lie unless complainants are in possession has in recent years been modified by the terms of state legislation, and the effect given the same in the federal courts."

Woods v. Woods, 184 Fed. 159, 163.

It has been held that a bill in a suit to quiet title must show that the complainant has not a plain, complete and adequate remedy in an action at law. If the complainant relies upon the usual averments in a suit to quiet title, the bill containing no independent averments which bestow jurisdiction, then an allegation of possession by complainant or non-possession by defendants has been held necessary to confer jurisdiction, but such an allegation is necessary only because without such it will not appear that there is not a remedy in an action at law. If the bill contain other allegations which show that there is no plain, adequate and complete remedy in an action at law, then there is no necessity

for any allegations as to possession, for the court takes jurisdiction by reason of such other averments.

> "If the controversy be one in which a Court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."
>
> Holland v. Challen, 110 U. S. 15; 28 L. ed. 56.

Holland v. Challen was a suit to quiet title. No one was in possession. The fact that the court took jurisdiction where no one was in possession of the land and where, consequently, an action in ejectment could not afford adequate relief, shows plainly that the question of possession is secondary and subordinate to whether full relief can be had in an action at law.

> "It is not an objection to the jurisdiction of equity that legal questions are presented."
>
> Holland v. Challen, supra.

> "It frequently occurs that equitable and legal elements are so mingled that it is difficult to separate them, but this does not oust the jurisdiction. Decrees are so moulded as to meet the different phases of the controversies, and the rights of the litigants are preserved and appropriate remedies applied."
>
> New Jersey, etc. v. Gardner, etc., 178 Fed. 782.

> "It is strenuously insisted that the remedy at law was adequate, and that, as the right of possession was purely a legal question and *for a jury,* the Court of Chancery should have declined jurisdiction, but inasmuch as the case came within the provisions of the statute, and equity could alone afford the entire relief sought, the fact that legal questions were also involved could not oust the court of jurisdiction. The jurisdiction in equity

attaches, unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances."

Gormley v. Clark, 134 U. S. 338; 33 L. ed. 909, 914.

The appellants have not a plain remedy in an action in ejectment against the Southern Pacific Company. As was said in Northern Pacific Railroad Co. v. Smith, 171 U. S. 260, 271; 18 Sup. Ct. 794, 798; 43 L. ed. 157, 161:

"There is abundant authority for the proposition that, while no man can be deprived of his property, even though in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts, may, by permitting a railroad company, without objection, to take possession of the land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. *His remedy must be sought either in a suit in equity,* or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes."

The same rule is laid down in Gurnsey v. Northern Cal. Power Co., 160 Cal. 712, where an electric transmission line had been built and it was sought to eject the company:

"Public policy requires that, under such circumstances, the remedy of ejectment should be denied to plaintiff, when the effect of a judgment in such an action would be to destroy the efficiency of the electric line system by taking possession from defendant of that part of it constructed over the land of plaintiff, and thus destroying the public rights which have intervened. * * *

> "The principle which underlies this rule is not based upon any consideration of rights pertaining to the public service corporation itself, but solely upon consideration of public policy."

Appellants admit that as to that portion of the land occupied by the appellee Southern Pacific Company which is essential to the service of the company as a railroad, the company may not be ousted; at the same time, appellants claim that it is only as to that portion which is thus esesntial that the company can invoke the doctrine announced in the two cases last cited. In other words, as was said in the Gurnsey case, the doctrine grows out of "no rights pertaining to the public service corporation itself, but solely upon considerations of public policy". That public policy protects such a company as to its railroad track, every-day observation convinces all. That public policy does not protect such a company, in the exclusive use of land which forms the harbor of a growing city upon a great, navigable stream, cannot be questioned. If the company's possession is to be defended upon the ground of public policy or the public interest, the very nature of the property involved and every-day observation negative the existence of the right to possession founded upon such a defense.

As was said in Ill. Cent. R. Co. v. Ill., 146 U. S. 387; 36 L. ed. 1043, the idea that a single "private corporation, created for a definite purpose, one limited to transportation of passengers and freight between distant points and the city, can be placed in control of the harbor of a city of vast and increasing commerce, cannot be defended."

We are not discussing here, at this time, ownership of the land, but we are assuming what appellants allege in that regard, viz.: ownership in themselves, and are now considering the question whether, given ownership in appellants, public interest demands, or could possibly demand, that the appellee, Southern Pacific Company, be protected in its exclusive use of the land involved, which is sufficiently described in the amended bills of complaint to show that the property of the sixteen complainants constitutes the virtual harbor of the City of Sacramento.

In the Illinois Central case, supra, the railroad relied upon a grant, from the state legislature, of a most substantial character, in perpetuity in fee, without the right of alienation, however, and the United States Supreme Court said of that grant:

> "We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation."

Appellants are not asking, and are not called upon to ask, the setting aside of any such grant as was involved in the preceding case. We are citing that case merely as it bears upon whether the appellee Southern Pacific Company can find any defense for its exclusive control of the harbor of the City of Sacramento in the demands of public policy. If the company in possession does not own the land, its only right is a right of possession in which the public interest or public policy protects it. If public policy offers no protection to the company, then,

as between the parties to these suits, the appellants are entitled to every right which ownership in fee draws to it, including the right of possession. On account of public policy, the United States Supreme Court not only held that the railroad company (in the Illinois Central case, supra) had no right to exclusive control over the land involved, but, in order to give effect to the clear demands of public policy as contrary to the claims of the company, the court found the grant, although it was of the character hereinabove indicated, was no deterring obstacle, but set it aside upon the ground that, so contrary to public policy was the exclusive control of the harbor of a city by a private transportation company, public interest exacted that the grant should be held to be only a revocable license.

In all the opinions touching the question of the right of a public service corporation in possession of land to keep possession, once in possession, it has been made plain that the consideration shown, which has led to the well-recognized doctrine against ejectment, is founded upon public interest alone and extends only to property which is necessary to continuous operation by such corporation, or, as many of the cases state it, to such land as is "absolutely essential" to the operation of the utility. As recently as in Western Union Telegraph Co. v. Ga. R. & Banking Co., 227 Fed. 291, the following language and citations are found:

> "This question has been decided in principle adversely to the contentions of the defendants in the case of Atlanta, Knoxville & Northern Ry. Co. v. Barker, 105 Ga. 534-542, 31 S. E. 452, in which in a very elaborate opinion Mr. Justice Cobb held that

a person could not recover in ejectment a right of way occupied by a railroad over his land upon which the railroad had built *its tracks* and *was operating* its lines, although the plaintiff held title to the land; *the decision being based upon the interest of the public involved* in the continuous operation of the railroad. The same question is discussed and decided in the same way in the case of Charleston, etc., Ry. Co. v. Hughes, 105 Ga. 1, 16, 30 S. E. 972, 978, 70 Am. St. Rep. 17, where a railroad company entered upon certain property by agreement with the life tenant, and thereafter upon the death of the life tenant the remaindermen brought suit for the land. In this case the court said:

> "'Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight, and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession, *which is absolutely essential to its complete performance of the public duties required of it,* become matters of more than private concern, and in which the public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure substantially the same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject-matter of the controversy'.

"These decisions are quoted approvingly by the Supreme Court of the United States in several cases. The Court of Appeals of the Eighth Cir-

> cuit reached the same conclusion in the case of St. Paul, etc., Co. v. W. U. Tel. Co., 118 Fed. 497, 519, 55 C. C. A. 263, cited above, in which it granted the alternative relief prayed for in this case. The Supreme Court of the United States, in the case of New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, L. ed. 820, citing the two Georgia case above in 105 Ga., granted the same alternative relief to the city of New York in a very exhaustive opinion on the subject. See, also, Roberts v. Northern Pacific R. R. Co., 158 U. S. 1-30, 15 Sup. Ct. 756, 39 L. ed. 873; Northern Pacific R. R. Co. v. Smith, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. ed. 157; Donohue v. El Paso, etc., R. R. Co., 214 U. S. 499, 29 Sup. Ct. 698, 53 L. ed. 1060."

We know of no case of final decision in an appellate court where a court of equity has declined jurisdiction of a suit of the character of this appeal. As is stated in the foregoing quotation, the relief granted has usually been of an alternative character, giving the defendant time within which to pay for the land, if it be shown upon trial to be essential to the operation of the road, but in no case has the right to try the question of a corporation's right to possession been denied a complainant in equity under conditions at all similar to those presented in the pending suits. The fact that the appellees are public service corporations does not give them immunity from being sued in equity. The cases cited in the case last above quoted were suits in equity tried upon their merits, with decrees, and wherever decided for complainants, the decrees saved to the defendants only the right to pay for the land "absolutely essential" to continuous operation of the road. Under the pleadings, ownership in appellants must be assumed,

and, as was said in Sharon v. Tucker, 144 U. S. 545; 36 L. ed. 535:

> "As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them, there does not seem to be any just reason why the relief prayed should not be granted. Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate, or interest of parties, that is, their title, may be proved or secured, or to remove obstacles which hinder its enjoyment. 1 Pom. Eq. Jur. Sec. 171. The form of the remedy will vary according to the particular circumstances of each case. 'It is absolutely impossible' says Pomeroy, in his treatise 'to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interest, and of the circumstances attending them, and of the relations arising from them, are practically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations." * * *
>
> "'Equity', said the Court, 'will frequently interfere to remove difficulties in land titles, where a party cannot proceed without difficulty at law; * * * and in many such cases it will lighten the burden, and settle many controversies, and bring them into a small scope. And where the title is purely legal, for such and similar causes to those we have enumerated, equity has carved out a branch of jurisdiction, and a class of bills, termed in the books, ejectment bills, in which not only the title is made clear, but the possession decreed also."

Suits, involving the questions here presented, against public service corporations in possession, are most

numerous. The opinions in them set out that they are properly suits in equity, because in equity alone can decrees be made and entered so moulded as to suit the varying circumstances arising. In Highland Boy Gold Min. Co. v. Strickley, 116 Fed. 852, 855, it is said:

> "Counsel for the defendant invoke the rule that, where the owner of land has knowingly permitted a corporation that is entitled to exercise the right of eminent domain to construct and put in operation its railway, tramway, or other improvement upon his property, he is thereby estopped from recovering possession of the property occupied, and is restricted to his judgment for just compensation. Buckwalter v. Railway Co. (Kan.) 67 Pac. 831, 832, and cases there cited. Conceding, without deciding, the soundness of this rule, and its applicability to the case at bar, there are two insuperable objections to a reversal of this judgment on its account. In the first place, the estoppel upon which counsel relies is an equitable, and not a legal, one. It is not an estoppel of record, but an estoppel in pais. The defense which he founds upon it is not a defense at law, but a defense in equity. * * *
>
> "*That ruling may well have been sustained upon the ground that there had been no evidence offered or introduced to establish the proposition that it was necessary for the defendant to use the premises it was occupying, or any part of the property of the plaintiff, for the purpose of conducting its mining and smelting operations. It is always an indispensable prerequisite of the right to exercise the power of eminent domain over the property of an owner of real estate to show that it is necessary to use his property to carry on the business of the quasi public corporation which seeks it.* Mining Co. v. Seawell, 11 Nev. 394; Mining Co. v. Corcoran, 15 Nev. 147, 154. There was no proof, and no offer of proof, that it was necessary to use any portion of the property of the

> plaintiff to conveniently conduct the business of the defendant. In the absence of this and other evidence which would warrant this company in exercising its right of eminent domain, if it has that right, there was no error in the refusal of the court to permit it to prove the value of this property, nor in its instruction to the jury to return a verdict for the plaintiff."

Again, in Osborne & Co. v. Missouri Pac. R. Co., 147 U. S. 248; 37 L. ed. 155, 161, it is said:

> "Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition.
>
> "Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiae.*"

A distinction has been made between suits where it appears that only a damage has resulted to the property involved, and those presenting a taking of the land involved, entitling the owner to demand compensation.

> "And if the case made discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere. To the same effect is Booth on Street Railway Law, 189; Elliott on Roads and Streets, 536; Tiedeman on Municipal Corporations, sec. 307; 2 Dillon on Municipal Corporations, sec. 723d; Story v. New York Elevated R. R. Co., 90 N. Y. 179; 43 Am. Rep. 146;

Lahr v. Metropolitan etc. R. R. etc Co., 104 N. Y. 268; Columbus Ry. Co. v. Witherow, 82 Ala. 190; State v. Berdetta, 73 Ind. 185; 38 Am. Rep. 117."

Willamette I. W. v. Oregon Ry. etc. Co., 46 Am. St. Rep. 620, 627.

Nevertheless, in even the former class of cases, jurisdiction in equity has not been uniformly declined, as appears from Story v. N. Y. Elevated Ry. Co., 90 N. Y. 122; 43 Am. Rep. 146, from which case we extract the following (pp. 151, 153, 158, 159-161):

"While the legislature may regulate the uses of the street as a street, it has, we think, no power to authorize a structure thereon which is subversive of and repugnant to the uses of the street as an open public street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact depending upon the nature and character of the structure authorized.

* * * * * * * *

"The defendant's railroad, as authorized by the legislature, directly encroaches upon the plaintiff's easement and appropriates his property to the uses and purposes of the corporation. This constitutes a taking of property for public use. It follows that such a taking cannot be authorized except upon condition that the defendant makes compensation to the plaintiff for the property thus taken.

* * * * * * * *

"The argument has been pressed upon our attention with great ability that as railroads, like streets, are intended to facilitate trade and commerce, and lands taken for either are taken for public use, the legislature may in its discretion appropriate the public streets of our cities to the use of railroad corporations, and this without reference to the form of their structure or the extent of the injury wrought upon property abutting

thereon. This is a startling proposition, and one well calculated to fill the owners of such property with alarm. It cannot be that the vast property abutting on the streets of our great cities is held by so feeble a tenure. This court has repeatedly held that such a rule has no application where the abutting owner owns the fee of the bed of the street; and we are of opinion that in cases where the public has taken the fee, but in trust to be used as a public street, no structure upon the street can be authorized that is inconsistent with the continued use of the same as an open public street. * * *

"The argument drawn from the great benefit which these roads have conferred upon the city of New York can have but little weight in determining the legal question presented in this case. No doubt these roads have added much to the aggregate wealth of the city of New York, and have greately promoted the convenience of its citizens; but the burden of so great a public improvement cannot rightfully be cast upon a few of its citizens, by appropriating their property to the public use, without compensation. The inhibition found in the Constitution against the right of the sovereign to appropriate private property to public use without making compensation therefor was intended to secure all citizens alike against being compelled to contribute unequally to the public burdens.

"We are of opinion that the law under which the defendant is incorporated authorizes it *to acquire such property as may be necessary* for its uses and purposes, upon making compensation therefor. This was substantially determined in the Matter of New York Elevated Railroad, 70 N. Y. 327; Gilbert Elevated Railroad Co., id., 361.

"We have reached in this case the following conclusions:

"First. That the plaintiff, by force of the grant of the city, made to his grantors, has a right

or privilege in Front street, which entitles him to have the same kept open and continued as a public street for the benefit of his abutting property.

"Second. That this right or privilege constitutes an easement in the bed of the street which attaches to the abutting property of the plaintiff, and constitutes private property, within the meaning of the Constitution, of which he cannot be deprived without compensation.

"Third. That such a structure as the court found the defendant was about to erect in Front street and which it has since erected, is inconsistent with the use of Front street as a public street.

"Fourth. That the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor.

"Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character—and if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff—he has the right to restrain the erection and continuance of the road by injunction.

"Sixth. That the statutes under which the defendant is organized authorize it *to acquire such property as may be necessary* for its construction and operation by the exercise of the right of eminent domain.

"Seventh. The injunction prohibiting the continuance of the road in Front street should not be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same."

Disposing of controversies of this sort in suits in equity is not the carrying of an action at law in damages into a court of equity, as is contended by appellees. The point, however, that such is the case, has often been made, and is satisfactorily disposed of against such a

contention in Galway v. Metropolitan Elevated Railway Co., 28 N. E. 479, 482, where it is said:

> "The defendants' chief contention is that the relief in equity, as now given against elevated railroads for invasions of the rights of abutting owners in streets, is, practically, an action to recover permanent damages for such injuries. * * * While equity courts have frequently suspended the remedy, as they did in this case, by injunction upon conditions, as for a specified time, or until the wrong-doer has been afforded an opportunity to condemn the property invaded, or has satisfied the owner's damages, they have never, to our knowledge, rendered judgment for such damages, or authorized the collection thereof by the owner. The privilege of securing the right to continue the trespasses complained of has, when authorized, been granted as an act of grace and favor to the offending party and not as matter of right to the injured owner. * * * Equity courts can, by virtue of their power to grant specific relief, obviate the difficulty attending an action at law in giving permanent damages for an injury to real property, by providing that a title to the easements required shall be conveyed as a condition of the relief granted. The court, having the authority to grant a perpetual injunction, does not impair its exercise of such authority by permitting the offender to escape its effect by voluntarily paying the owner for the property injured. It is thus left optional with the trespasser to remedy the wrong done by him or to suffer the judgment of the court to stand. While the injury inflicted upon the wrong-doer by neglect to comply with the conditions may be so onerous, in many cases, as to inflict great loss upon him, it nevertheless does no more than to place in his hands the means of escaping from the disastrous consequences of a judgment which has been rendered inoperative by his own wrongful conduct. A party who voluntarily prosecutes a public enterprise for his own benefit, without regard to the

legal rights of individuals who may be damaged by its operation, must always run a great risk of being placed in a dangerous situation through his unlawful conduct; but this is the result of his own volition, and the injury which necessarily follows such action cannot lawfully be imposed upon the parties injured without disregarding the constitutional provisions intended for their protection. It furnishes no cause of complaint to the wrongdoer that the court, having power to restrain him altogether from continuing his trespasses, should mitigate the severity of its judgment by authorizing him to repeat them upon complying with special conditions prescribed by the judgment, so long as it is left to his election to perform them or not."

In New York v. Pine, 185 U. S. 93, 46 L. ed. 820, 825, it is said:

"But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuse to pay, the injunction issues."

In the case cited by the lower court, as the basis of the court's decision, Roberts v. Northern Pac. R. Co., 158 U. S. 1; 39 L. ed. 873, 876, recognition is given to the jurisdiction of a court of equity to determine con-

flicting claims between owners and railroads in possession. The opinion in that case limits the rights of a railroad to hold possession to such of the property as it could have condemned by the exercise of eminent domain.

> "So far as those portions of the lands, described in the bill of complaint, consist of parcels held and used by the railway company for the *necessary* and *useful purposes of their road as a public highway,* it is obvious that the title and possession thereof cannot be successfully assailed by the appellants. * * *
>
> "The conclusion, therefore, seems warranted that, as to those portions of the lands in question which are occupied and used by the railroad company, the county having stood by for years, and permitted the company to proceed in the construction of its road and appurtenances at a vast expense, and having accepted large sums as taxes, would be estopped from interfering with the possession of the railroad company. A fortiori, it follows that Roberts, buying with notice, could not maintain either trespass or ejectment for such portions, nor would he, as such purchaser, be entitled to recover damages for the occupation thereof.
>
> *"The foregoing observations apply only to those portions of the lands in question which have been actually occupied and used by the railroad company for corporate purposes, or, in other words, to such lands as the railroad company could have condemned by the exercise of its right of eminent domain.*
>
> "But, as it appears in the bill and answer, that considerable portions of the land in dispute are not held or occupied *by the railroad company for its necessary public purposes,* but for sale to others, and presumably could not have been procured by the company under its power of condemnation, other questions are raised for our consideration."

If a railroad in possession may not be sued in order that the extent of its right to condemn may be tested, or, what is the same thing, that the necessity may be tested, then the observations made by the court in the Roberts case would necessarily be made to apply not, as the Court says, to such land as the railroad might condemn, but to all land in its possession—by the mere assertion that the land is necessary.

Under that portion of the foregoing quotation from the Roberts case which states that "*a fortiori,* it follows that Roberts, buying with notice, could not maintain either trespass or ejectment for such portions, nor would he, as such purchaser, be entitled to recover damages for the occupation thereof", the lower court held that complainants did not state facts sufficient to constitute any cause of action against the defendant Southern Pacific Company for the reason that "it is settled that the right of action for damages in such an instance is in the party holding the title at the time of the original wrongful entry".

Appellants concede that, where a railroad company enters under an instrument which places no limit upon the time during which the company may hold, or enters permissively by the acquiescence of owners without any agreement as to the length of time during which the company is to hold, the law is as stated in the last quotation from the opinion of the lower court. Appellants, however, say that, if a railroad company be in possession under a lease for a definite period of years, or be in possession under any sort of circumstances which fix the length of time during which the company

has the right to hold, upon the expiration of such time, an owner, at the time of expiration, is entitled to every right which the owner at the time of the original entry was entitled to, and that the holding over of the company after such expiration is wrongful, for which the owner at that time has his redress. In other words, the original owner may sell the property involved, subject to whatever agreements existed affecting the property, and upon the expiration of such agreements, the then owner may sue without reference to the original entry or subsequent holding of the company.

It is alleged in the answers (Trans. pp. 4, 8), "that in the year 1863, Central Pacific Railroad Company of California, a corporation formed, organized and existing under the laws of the State of California, and the predecessor in interest of the said defendants, entered into possession of the said real property and lands described in the complaint." Said Central Pacific Railroad Company of California was organized in the month of June, 1861; said company was consolidated with the Central Pacific Railroad Company, a corporation formed and organized under the laws of the State of California, in the month of August, 1870, and defendant Central Pacific Railway Company is the successor in interest of the said last-named corporation. If the Central Pacific Railroad Company of California entered under such circumstances as fixed its right to hold, let us say for the purpose of this point, at fifty years, it would follow that the rights of the company to hold, so far as any rights existed in the company itself, expired in 1913. It certainly would not be logical, it is not the law, that

the owner in 1913, being a purchaser through mesne conveyances from the owner in 1863, should show title in himself in the year 1863, but at most would be required to show ownership in himself at the time of expiration of the rights of the company, viz., 1913.

None of the cases cited in the opinion of the lower court, nor any case relied upon by appellees, upon this point, show that any condition of holding on the part of the railway company was involved other than one of an express or implied indefinite duration. Where the rights of the company are limited in years, the cases hold that upon expiration of the period of limitation, the company's rights, in so far as they exist in the company itself, cease and terminate, and the rights of ownership, then existing, are enforceable.

In Charleston etc. Ry. Co. v. Hughes, 70 Am. St. Rep. 20, the general questions involved in a suit by an owner against a railroad company in possession are elaborately discussed. The case is perhaps the fullest of the reported cases on the subject. Late Justice Lamar was one of the interested parties litigant as well as a participating attorney in the suit. The case is cited as authority in many federal decisions, including a very late case quoted hereinabove.

The opinion shows that in 1872 the Port Royal Railroad Company, a corporation of the State of Georgia, located its line of road across the land of one Holt under a deed from Verdery, trustee. The railroad company entered into possession and built on the land "a part of its tracks which were necessary to a com-

plete construction and operation of the railroad which it was authorized by its charter to build".

In 1896 Mrs. Hughes, W. K. Miller, and J. R. Lamar presented a petition to the judge of the Superior Court setting forth that they were the owners of the land in the possession of a receiver, which land was described in the deed from Holt to the Port Royal Railroad Company; that upon the same there had been erected railroad tracks which were then in possession of the receiver and in use as a part of the railroad yard and terminals in the City of Augusta; that Mrs. Hughes became entitled to possession of the property upon the death of her mother in 1894, and *that she subsequently conveyed an undivided half interest in the same to W. K. Miller and J. R. Lamar.*

The defendant railroad company answered the petition by pleas setting up defenses, in the main, similar to the defenses pleaded in the pending suits. A demurrer to the plea was sustained and the ruling became the basis of an assignment of error. The suit went to trial and judgment was entered for the plaintiffs against the defendant for the land in dispute, directing a writ of possession to issue.

The contention of plaintiffs was that the railroad company had acquired the interest of a life-tenant alone and that Mrs. Hughes and her co-defendants, by conveyance from her, were remaindermen.

In the course of the opinion it is said:

> "If a life-tenant could not convey to a railroad company for a right of way the interest of remainderman, the most solemn judgment that could

be rendered in condemnation proceedings, to which the railroad company and the life tenant alone were parties, could not operate as an estoppel upon the remainderman. * * *

"Therefore a railroad company which sees proper to construct its railway over land where the title is in the condition above referred to acquires the interest of all those with whom it deals by negotiation, or against whom it proceeds by condemnation, but takes the risk of other persons interested making claims in the future, whether they be left out of the negotiations or the condemnation proceedings by mistake or from necessity. In the present case, condemnation proceedings against the assignee of the life tenant, to whom the entire amount awarded as damages was paid, is pleaded in bar of the right of the remainderman in the same property to have compensation for her interest after the termination of the life estate. This cannot be the law. For if so, the right of the legislature to confiscate in the interest of public improvements under the guise of condemnation proceedings would be complete, it being only necessary that one person who was interested in the property should have notice, and by such notice the interest of every other person would be held to pass, although ignorant of the proceedings under which their property was taken. * * *

"When a railroad company, without warrant or authority, enters upon the land of another, it is, as a general rule, no less a trespasser than any other person who is guilty of an act of a similar nature. If, however, a railroad company enters upon the land with the consent of the owner, or under license from him, and the property thus taken possession of becomes such a necessary component part of its railroad that to surrender its possession would interfere seriously with the interest of the company, the landowner, although entitled to compensation for his property, might, by his conduct in allowing the entry upon his land and permitting the com-

pany to so use it as that it could not be abandoned without great prejudice to its rights, estop himself from asserting against the company the legal title to the property by an action of ejectment. The propositions above stated are simply the application of familiar principles of law which govern in all transactions of the character above referred to, whether the controversy be between natural persons alone, or between such persons and corporations, and whether the corporation be public or private. A railroad corporation, being one charged by the law with the performance of certain duties to the public, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line of railway, of which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to the possession of land, where the rights of individuals only are involved, are purely matters of private concern. Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight, and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession which is absolutely essential to its complete performance of the public duties required of it, become matters of more than private concern, and in which the public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure substantially the same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject matter of the controversy. That a railroad corporation has a right to

deprive a person of his property for its uses by doing acts which in an individual would be dealt with as a trespass is not contended for; but when a railroad company enters upon land and constructs its road without lawful authority, and the landowner acquiesces in the wrongful act and the consequent appropriation of the property to a great public use until the same has become a necessary *component part* of the property required by the railroad to perform its public duties, such landowner will be held to have waived his right to retake the property, and will be remitted to such other remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated. If this is the case in reference to unlawful entry, for a stronger reason the same result would follow, if the entry by the railroad company in the first instance was by the authority or consent of the landowner, even though it be under a parol license and the legal title to the land still remain in the landowner. The current of modern authority sustains the proposition that when a railroad company is in possession of land, using it as a right of way, although not having acquired the legal title thereto, the landowner would be estopped from ejecting the company from the premises if it was shown either that the original entry was with his consent, or that the entry without his consent was so long acquiesced in that to allow the company to be ejected would either dismember the property of the company, or essentially interfere with its ability to discharge the public duties incumbent upon it. This, however, is subject to the qualification that the landowner is entitled to compensation for his property and this must be ascertained and paid to him before the corporation is vested with a complete right to hold and enjoy his property as its own.

"In the case of Indiana etc. Ry. Co. v. Allen, 113 Ind. 581, the general rule is stated to be, that when land is seized by a railroad company without right

the owner may maintain ejectment; but where there has been an acquiescence on the part of the owner until public rights have intervened, such action will not lie, but the landowner will be confined to a recovery of compensation. In Louisville etc. Ry. Co. v. Beck, 119 Ind. 124, it was held that:

> 'A landowner who stands by without demanding compensation, until a railroad company has so far completed and put in operation its road over his land as to involve the public interest, can neither enjoin the company nor maintain ejectment to recover his land. The only remedy left to the landowner, in such a case, is to proceed within the proper time to have his damages assessed and enforced against the railroad company.'

"In the case of Galveston etc. R. R. Co. v. Pfeuffer, 56 Tex. 66, it was held that where land was appropriated by a railroad company without authority the right of the owner to compensation was not waived by his standing by and permitting the company to construct its road over his land, nor was his right to recover the land lost if the company refused to make compensation. In the case of McAulay v. Western etc. R. R. Co., 33 Vt. 311, 78 Am. Dec. 627, it was held, where a landowner acquiesced in the occupation of his land for the construction of a railroad, without requiring prepayment of damages upon a contract for future payment by the company, and the road was constructed and put in operation, that he could not afterward, on failure to obtain payment, maintain ejectment or trespass for the land: See, also, Roberts v. Northern Pac. R. R. Co., 158 U. S. 1; 3 Elliott on Railroads, sec. 1049. In those cases where it has been held that the landowner would be entitled to bring suit against the company in ejectment, and where a judgment in ejectment was allowed to be rendered, it was also held that upon appropriate pleadings the issuing of a writ of possession would be stayed until the company could be

allowed a reasonable time in which to acquire title to the property, either by purchase or condemnation, or that the enforcement of such a judgment in ejectment would be enjoined for a similar reason: Pittsburg etc. R. R. Co. v. Jones, 59 Pa. St. 433; Conger v. Burlington etc. Ry. Co., 41 Iowa, 419; Jacksonville etc. Ry. Co. v. Adams, 33 Fla. 608. In the case of Young v. McKenzie, 3 Ga. 31, it was held that an action of ejectment against a bridge company to recover property in its possession, and necessary for the purpose of building the bridge, but to which the title had not been acquired either by purchase or condemnation, should be enjoined until the bridge company should have a reasonable time to comply with the terms of its charter in reference to condemning the property for its use. In this case there had been an attempt to acquire the land by condemnation, which failed for the reason that the proceedings before the appraisers were recorded in the wrong place. Under color of this authority the land was entered upon and the bridge built, and this was one of the reasons which brought the court to the conclusion that in equity the company should not be ejected until an opportunity had been afforded it to acquire the land by condemnation. * * *

"We are of the opinion that the petitioners in the present case have waived their right, if any they had, to insist in the first instance upon a judgment in ejectment against the railroad company, not by anything they have done before they instituted their suit, but by the way in which they have brought their suit and the character of the same and of the relief prayed in the original petition. The assets of the Port Royal and Augusta Railway Company were in the custody of a court of equity through the medium of a receiver, and he had possession of the property now in controversy. The petitioners did not apply to this court for leave to go into a common-law court and assert there a strict and technical common-law right; *but*

they applied to this court of equity to be allowed to come in and make themselves parties to the pending suit, and set up their right in such suit against the receiver and the company which was represented by him; and they prayed for a judgment declaring them to be the owners of the property described in their petition, and that they be placed in possession of the same, if the court should decide in their favor. * * *

"Under the rulings we have made, the only question to be determined upon another trial of this case would be, what compensation should be paid to the petitioners for the interest of the remainderman in the property? As all other questions are finally settled by this decision, direction is given that this single issue be submitted to a jury, and that they determine it in accordance with instructions given by the trial judge, following the rulings we have made. When the amount to be paid to the petitioners is thus ascertained, a decree should be entered, allowing the railway company a reasonable time in which to pay the amount thus found, and upon payment of the same, the title to the property to vest in the railway company. Upon a failure to pay the same within the time limited, the right of the company to acquire the property should be decreed to be lost, and a writ of possession should issue to enforce the judgment in ejectment already rendered in the case."

Again in Richards v. Buffalo etc. R. R. Co., 137 Pa. St. 524, it is shown that parties purchasing land subsequent to the entry thereon of a railroad company acquire *whatever rights in the land itself the vendor has, and may enforce those rights in the same manner as the vendor might himself.*

"It clearly appears that the New Castle and Franklin Railroad Company, predecessor of defendant company, entered upon the land in contro-

versy and constructed its road under and in pursuance of the grant aforesaid. There was no evidence tending to show that the land was appropriated for railroad purposes by either company by virtue of its charter powers, or otherwise than under the grant of right of way. In other words, unless defendant company had a right of possession under the alleged grant in connection with facts sufficient to constitute an estoppel, plaintiffs below were entitled to recover. * * *

"If the railroad company, through its agent, Mr. Loy, knew Mrs. Cousins owned the land in controversy, it should have procured a right of way executed by her in person, or by her duly constituted attorney in fact. Instead of doing so, it was guilty of the folly of accepting a grant from one who was neither owner nor the duly constituted attorney in fact of the owner. If the company actually knew the fact that Mrs. Cousins owned the land, how could it be deceived or misled by her alleged acts and declarations indicating the contrary? And on what principle can she or her vendee be estopped from asserting and proving the truth of that fact? If vitality can be thus infused into an unauthorized grant, it would be a very convenient way of circumventing the statute of frauds and perjuries. We think the learned judge was right in saying,

> 'If the railroad company knew the truth at the time they took the grant, the plaintiffs would not be estopped from showing the truth now.' * * *

"There is nothing in the record that would warrant a reversal of the judgment; but, while that is so, it would be inequitable, in view of all the circumstances, to permit it to be enforced without giving the appellant an opportunity of condemning the land, and acquiring the right of way in the manner prescribed by the act of assembly in such case made and provided. This can be done by ordering a stay of execution for sufficient length of time to enable the company to appropriate the land according to law.

> "Judgment affirmed; and it is ordered that upon payment of costs the execution be stayed for four months; and in the meantime the company, defendant below, may proceed to condemn the land, and acquire the right of way according to law."

There is a vast distinction between recovery of damages to property and the enforcement of legal rights pertaining to title in land itself. The foregoing cases and the many cases cited in them show that upon the expiration of the estate acquired by a railroad the rights of the then owner are enforceable in an appropriate suit, such as a proceeding in equity to determine the rights of the parties, taking into consideration intervening public interest.

THE REMEDY WHICH THE LOWER COURT HELD TO BE THE ONLY REMEDY OPEN TO APPELLANTS IS AN ACTION FOR DAMAGES FOR THE TAKING OF THE LAND.

The defendant, Southern Pacific Company, is in possession; the company is a public service corporation; appellants claim that only a small portion of the land occupied by the defendant Southern Pacific Company is necessary for the continuance of the service of the company to the public, and that public convenience is interested only to that extent; the defendant company claims that the whole of the land involved is necessary for its use in its service to the public.

Can it be said that final relief in either ejectment or damages would be as efficient as the relief which a court of equity can give? In Stuart v. Union Pacific Co., supra, it is held that relief which is conditional upon

the surrender of a claimed right is not complete and adequate. Plaintiffs claim the right of possession of a part of the land; it is not plain that they can sue in ejectment; if they sue in damages they surrender all claimed right of possession.

> "A remedy cannot be regarded as plain, complete and adequate when to pursue it is to jeopardize a part of what is claimed, irrespective of the merits."
>
> Stuart v. Union Pacific, supra, p. 757.

In the Stuart case the controversy was over a strip of land four hundred feet wide which was in dispute between the complainant and Union Pacific Railroad Company, a public service corporation, as appears from the following:

> "*What really is the subject of the adverse claims of the parties is a strip four hundred feet in width along the appellee's railroad.* Part of this is in the actual possession of the appellee, is occupied by permanent and costly railroad structures and is being used as a right of way for strictly railroad purposes. * * * In addition, there is a pronounced and bona fide dispute as to how much of the strip has been occupied and used as a right of way; the appellants insisting that this occupancy and use have been confined to twenty-five feet or less on either side of the central line of the railroad, and the appellee insisting that they have extended to fifty feet or more on either side. In these circumstnaces, *it is apparent, as we think, that the appellants are entitled to a hearing and decision as to what extent the appellee is entitled to occupy and use the tract as a right of way;* that they are not entitled to oust the appellee from its actual possession or to interrupt the operation of its railroad, *and that their suits*

can be completely and adequately determined by a suit in equity in the nature of one to quiet title, but not otherwise * * * There may be cases in which an action for compensation or damages under the statute would afford a plain, complete and adequate remedy, but this is not such a case, for in the absence of a prior determination of the dispute respecting the width of the strip actually occupied and used as a right of way, such an action could not be maintained without either conceding the greater occupancy and use asserted by the appellee, or risking a recovery of less than the actual damages. A remedy cannot be regarded as plain, complete and adequate when to pursue it is to jeopardize a part of what is claimed, irrespective of the merits."

The foregoing opinion is based upon Northern Pacific Railroad Company v. Smith, 171 U. S. 260; 43 L. ed. 157 in which case it is plainly and expressly said that an owner who has allowed a railroad company to construct its line over his land may not sue in ejectment as to the land essential to the operation of the road, but *must sue in equity* or under a statute if such exists. In that case it is said:

"There is abundant authority for the proposition that, while no man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts, may, by permitting a railroad company, without objection, to take possession of land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. *His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes.*"

The words of this case are the ruling of the United States Supreme Court; they are unmistakable.

> "The strength of the plaintiff's appeal to have its bill entertained is in its contention that a suit for damages would not enable it to get that to which it is entitled.
>
> "This feature of the case of the plaintiff was recognized in Tompkins v. International Paper Co., 183 Fed. 773; 106 C. C. A. 529, and it there saved the bill from dismissal. It cannot at this stage of the case be found that this is not the situation of the present plaintiff. Thus seems to stand the case without reference to the equity rules. By what token, however, can these rules be ignored? They are directly applicable to the question now raised and disposed of. Rule 22 (198 Fed. xxiv, 15 C. C. A. xxiv) expressly provides what shall be done 'at any time it appears' that the suit should have been brought at law. More than this, Rule 23 commands us not to dismiss a bill on this ground. The case may be proceeded with, and when it appears, if it does develop, that this case should be tried at law and the amount of damages assessed by the verdict of a jury, this may be done."
>
> Goldschmidt Thermit Co. v. Primos Chemical Co., 216 Fed. 382.

> "Reliance is placed upon rule 23 of the new equity rules (198 Fed. xxiv, 115 C. C. A. xxiv), which substantially provides that matters ordinarily determinable at law arising in equity suits shall be determined in the same suit according to the principle applicable without transferring the case to the law side of the court."
>
> American Car & F. Co. v. Merchant's Despatch Trans Co., 216 Fed. 908, 911.

> " 'Equity' said the court, 'will frequently interfere to remove difficulties in land titles, where a

party cannot proceed without difficulty at law; where the conveyances are lost, or in the possession of the opposite party; or where the parties are numerous, and the proof hard of access; and in many such cases it will lighten the burden, and settle many controversies, and bring them into a small scope. And where the title is purely legal, for such and similar causes to those we have enumerated, equity has carved out a branch of jurisdiction, and a class of bills, termed in the books ejectment bills, in which not only the title is made clear, but the possession decreed also."

"It is true that bills to make legal titles which are valid against all the world, except two descriptions of persons, recorded titles, and thus to protect them from creditors and innocent purchasers, have not been frequent. But if such bills cannot be allowed under the one state of conveyances, it must certainly be said that there is a defect of justice in our country. *A court of common law can give no relief in such a case,* and if equity cannot do it then is the case a hopeless one. If, however, the principles which govern courts of equity are examined, it will be found that there are many circumstances in this case, independent of defective conveyances, which sustain the jurisdiction.

See also Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 449 (35: 1063)."

Sharon v. Tucker, 144 U. S., 545 (36 L. ed. 536).

In United States v. Western Union Telegraph Company, 160 U. S. 53; 40 L. ed. 337, the following language is found:

"'if the controversy contains any equitable feature, or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of

it, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority."

In Davis v. Wakelee, 156 U. S. 680; 39 L. ed. 578, 584, it is said:

> *"It is a settled principle of equity jurisprudence that if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit* (quoting many cases). *Where equity can give relief plaintiff ought not to be compelled to speculate upon his chance of obtaining relief at law."*

The suits being in their nature suits of equitable cognizance are properly on the equity side of the court; as such they should be tried under the rules and procedure obtaining in equity. If a suit be of equitable character, or belongs to one of the general classes of suits in equity, it should be tried in equity under Rule 23, even though a jury may need to be called.

> Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 769; same, 216 Fed. 383.

Rule 23 serves the desirable purpose of permitting all suits in equity—of an equitable character—to remain on the equity side of the court and at the same time giving to the parties, if they are so entitled, their right to a trial by jury.

> "The above cases will suffice to blaze for us the path upon which to travel. It is to be observed, however, that Root v. Railway was decided before the adoption of the Equity Rules promulgated November 4, 1912, and therefore before we had Rules 22 and 23. The administrative policy enjoined upon us by these rules is not to permit plaintiffs

to be hampered by procedure objections on the ground that complaint had been made to the wrong court, but, while preserving to defendants all their rights in the disposition of cases, nevertheless to dispose of them by having them determined by that court to whose decision they are properly subject.

"The spirit and intendment is that the question by what tribunal the case should be decided is to be determined when the question can be decided in the full light of all the information obtainable. Plaintiff is to have accorded to it its right to equitable relief in form and method of procedure, and the defendant is to be given full protection in the assertion of its right in a proper case to have it submitted to a jury."

Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 769, 775.

Likewise Whitehead v. Shattuck, supra, was decided before we had Rules 22 and 23 and, under those rules, we venture the assertion that jurisdiction in equity in Whitehead v. Shattuck would have been sustained, for in its character it was a suit in equity and, under Rule 23, the complainant would be permitted to have the suit determined by that court to whose decision it is properly subject and at the same time the defendant would be given full protection in the assertion of his rights to have it, by reason of his possession, submitted to a jury.

It accordingly seems that no ground longer remains for federal courts to decline jurisdiction in suits in equity, brought under a state statute, enlarging the class or the equitable rights under such statutes as embrace any one of the large heads of equitable jurisdiction. Of such statutes none is more often invoked than

the statutes providing for the removal of clouds from title.

All the authorities cited hereinabove tend to one end, and that the sustaining of an equitable principle which has existed since the foundation of courts in equity, namely, the giving to complainants the right, in equity, of correcting wrongs wherever there appears no plain, adequate, complete, efficient and practical remedy in an action at law. If, too, the remedy in an action at law is at all doubtful, jurisdiction in equity should not be and has not been denied complainants.

> "It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit." (Citing many cases.)
>
> Davis v. Wakelee, 156 U. S. 680; 39 L. ed. 578, 584.

And further, there may even be a legal remedy, and yet equity will not decline cognizance.

> "It is objected that equity can exercise no jurisdiction in the case, as adequate relief may be obtained at law.
>
> "There may be a legal remedy, and yet if a more complete remedy can be had in chancery, it is a sufficient ground for jurisdiction."
>
> Wylie v. Coxe, 15 How. 415; 14 L. ed. 573, 5.

Once having acquired jurisdiction, a court of equity may grant any appropriate relief, and there is no combination of circumstances so intricate which it may not analyzie, solve and adjust.

In Sharon v. Tucker, 144 U. S. 545; 36 L. ed. 535, 6, it is said:

"The form of relief will always be adapted to the obstacles to be removed. *The flexibility of decrees of a court of equity will enable it to meet every emergency.*"

EVEN IF THE COMPLAINANTS HAD A PLAIN, ADEQUATE AND COMPLETE REMEDY IN AN ACTION AT LAW, THE LOWER COURT SHOULD HAVE RETAINED THE SUITS FOR TRIAL IN EQUITY BECAUSE "ANOTHER FEATURE IS INJECTED INTO THE CONTROVERSY HERE WHICH IS CONTROLLING. THE DEFENDANTS NOT ONLY JOINED ISSUE WITH THE PLAINTIFF TOUCHING THE EQUITABLE CAUSE AS PLEADED BUT THEY HAVE SET UP A LIKE CAUSE" AND "AT THE SAME TIME THEY HAVE INTERPOSED ONE OR MORE EQUITABLE DEFENSES. BY SO DOING THEY HAVE WAIVED THEIR OBJECTION TO THE EQUITABLE JURISDICTION, AND CAN NOT NOW BE HEARD TO INSIST UPON THE LEGAL REMEDY". Pacific Coal & Trans. Co. v. Pioneer M. Co., 205 Fed. 582.

It will be observed that the lower court refused to consider the effect, upon its jurisdiction, of the defendants' having answered to the merits; in the opinion of the lower court the answer is not referred to once. In explanation of the court's silence in this regard, we feel it due the lower court to say that, in reply to our request that the court should supplement the opinion by words showing that we urged the point of waiver, here made, and the point that, having answered the original bill to the merits, the defendants' motion to dismiss was improperly and irregularly made, had no place in the record and should not be considered, the court stated that the omission to refer to those

matters was solely because the court considered them irrelevant.

From the earliest period in Chancery practice it has been the rule that all technical objections must be taken *in limine*—at the threshold—and that unless so taken they are deemed to have been waived. This was the rule in the English Chancery Courts, and is the rule in the federal and state courts.

We deem the points relevant, and, in support thereof, we cite the following authorities, in addition to Pacific Coal & Trans. Company v. Pioneer M. Co., supra:

1 Dan. Ch. Pr. 555, 630;

Kilbourn v. Sunderland, 130 U. S. 505, 14; 32 L. ed. 1008;

Reynes v. Dummont, 130 U. S. 354, 395; 32 L. ed. 934-43;

Tyler v. Savage, 143 U. S. 97; 36 L. ed. 89;

Wylie v. Cox, 56 U. S. 15; 14 L. ed. 753;

Oelrichs v. Spain, 15 Wall. 211; 21 L. ed. 43;

Lewis v. Cocks, 23 Wall. 446; 23 L. ed. 70;

Brown v. Lake Superior Iron Co., 134 U. S. 530; 33 L. ed. 1025;

Allen v. Pullman, 139 U. S. 658; 35 L. ed. 305;

Preteca v. Maxwell, 50 Fed. 677;

Reynolds v. Watkins, 60 Fed. 825;

Lone Jack International Mining Co. v. Megginson, 82 Fed. 89, 91;

Trust Co. v. Norwich, 71 Fed. 83;

Hollins v. Brierfield, 150 U. S. 381; 37 L. ed. 1115;

Elder v. McClaskey, 70 Fed. 555;

Waterloo Mining Co. v. Doe, 82 Fed. 45,

and an unbroken line of federal court cases, cited in the foregoing.

In 5 Ency. U. S. Sup. Ct. Rep. (p. 825), it is said:

> "It may be stated as a general rule that the objection to the exercise of jurisdiction by a court of equity on the ground that there is an adequate remedy at law, should be taken at the earliest opportunity, and before the defendant enters upon a full defense. * * * Where the existence of an adequate remedy at law is apparent on the face of pleadings, the objection should be taken by demurrer; where the defect is not thus apparent it would seem the objection should be raised by plea or answer."

This is also the rule as laid down by Mr. Daniell in his work on Chancery practice, where it is said:

> "If the objection on the ground of jurisdiction is not taken in proper time, namely, either by demurrer or plea, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it except in cases where no circumstances whatever can give the court jurisdiction. * * * Where the want of jurisdiction appears on the face of the bill, advantage should be taken of it by demurrer."
>
> 1 Dan. Ch. Pr., (6th Am. Ed.) p. 555.

And again at page 630:

> "We have before seen that an objection on the ground of jurisdiction must be taken either by demurrer or plea, before answer; otherwise, the court will entertain the suit, although the defendant may object to it at the hearing, unless it is in a case in which no circumstance whatever can give the court jurisdiction."

And in a note thereto it is said:

> "In general, when a court of equity has jurisdiction of the subject matter, the defendant, after the plea or answer is filed, cannot raise, as a new defense, the objection that the legal remedy is plain, adequate, and complete. This defense should be taken by demurrer, when apparent on the bill. Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. (l. c.) 1008, 9."

In Cobban v. Conklin, 208 Fed. 231, a case decided by the Circuit Court of Appeals for this circuit, in referring to the rule that in the federal courts an action to quiet title cannot be maintained where the complainant has a plain, complete and adequate remedy at law, the Court said:

> "But the rule was devised and the statute was enacted mainly to secure to the defendant the privilege of a trial by jury, and this he may waive. If in a suit in equity he answers and submits to the jurisdiction of the court, he cannot thereafter object that the plaintiff has a plain, complete and adequate remedy at law, provided that the subject matter of the suit is of a class over which a court of chancery has jurisdiction, and it is competent for a court to grant the relief sought." (Citing long list of cases.)

In jurisdictions not subject to the equity rules of the U. S. Supreme Court, it has been the practice that an amendment of a bill, after answer filed, which is immaterial and does not change the cause of action, but merely sets out more clearly the cause of action alleged in the original bill, does not alter the rule, and does not enable a defendant who has answered the original bill to demur to such amended bill upon any

technical grounds to which the original bill was open. This is the rule as stated by Daniell:

> "An amendment of the bill does not, however, enable a defendant who has answered the original bill to demur to an amended bill upon any causes of demurrer to which the original bill was open unless the nature of the case made by the bill has been changed by the amendments."
>
> 1 Dan. Ch. Pr., 409.

The rule as laid down by Mr. Daniell is followed in 1 Enc. Pl. & Pr., 490:

> "After an amendment of a bill in a material matter the defendant may plead, answer, or demur to the same as if it were an original bill no matter what may have been the state of the pleadings before the amendments was made and he is entitled to a reasonable time for that purpose.
>
> "An amendment of the bill does not, however, enable a defendant who has answered the original bill to demur to an amended bill upon any cause of demurrer to which the original bill was open, unless the nature of the case made by the bill has been changed by the amendment."

And, again, in Vol. 6, at page 414:

> "A demurrer to a bill or any part thereof is overruled by a plea either to the whole or the same part thereof. So, also, a demurrer to the whole bill or to a part of it is overruled by an answer to the bill or to the same part of it; and defendant cannot, after he has answered the original bill, if the plaintiff amends, put in a general demurrer to the whole bill, because the answer will overrule the demurrer."

The new equity rules have of course abolished demurrers and substituted therefor motions; if a defend-

ant who has answered without making technical objections, should later move upon any ground of such objection, his answer, *by virtue of the implied waiver accompanying it and taking effect upon its filing,* would overrule the motion; if the complainant amends the bill, setting up no statement of a new cause of action the waiver is not extinguished, nor is the right to object by defendant, upon grounds open to the original bill, revived; and this result is given effectual expression in Rule 32 in forbidding, in that it does not permit, such a useless step as filing a motion by defendant, after once answering, and in limiting such defendant to a new or supplemental *answer.*

Equity Rule 32 states:

> "In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as in case of an omission to put in an answer."

The foregoing rule has precedent in many English decisions in Chancery:

> "Defendants having answered and denied several charges in the bill, plaintiff thought it necessary to state several conversations very much at length, and for that purpose amended his bill. This amended bill was referred for impertinence and the master reported it impertinent. Plaintiff again amended his bill, and to the second amended bill one of the defendants put in a demurrer to the whole bill for want of equity. Plaintiff now moved that this demurrer be taken off the file for irregularity; and the main objection made to

the demurrer was that it was in fact overruled by the answer put into several of the facts of the original bill which remained a part of the amended bill; that these answers remaining still of record must be taken notice of by the court, and that these answers were inconsistent with the general demurrer which extended as well to the remaining parts of the original bill as to the additions made on the amendment.

"The Lord Chief Baron and Hotham B. were of opinion that as the answer remained part of the record, the court might take notice of the contents so far as to determine a demurrer to be irregular, which went to cover the parts of the bill which were before answered; and if this appeared to be so, it was as fatal to the demurrer, as if both answer and demurrer had originally belonged to the same record, and that as to the objection made to the general rule, that the plaintiff might state a distinct case by his amended bill, the answer is that when the case happens that the plaintiff makes a perfectly new case by the amended bill, the court would not consider an answer to a few formal or immaterial passages in the original bill which might remain a part of the amended bill, as any answer at all; but here it seems admitted that several substantial passages are answered.

"Demurrer to be taken off the file and suppressed."

Atkinson v. Hanway, 1 Cox Eq. 360 (1787).

The same rule was enunciated in other cases decided by the English courts.

In Ellice v. Goodson, 3 M. & C. 653, decided in 1838, the Lord Chancellors said:

"This is the case of a bill containing very long and complicated statements of matters and transactions to which the defendant put in an answer.

The plaintiff then amended his bill, and so far as I have been able to look, I do not find (nor indeed was it so argued) that the matter alleged to be multifarious was introduced by the amendments. On the contrary, the whole of the matter on which the objection of multifariousness is grounded is to be found in the original bill.

"The defendant's counsel put the case upon the ground that you must take the amended bill as the record; and that the court is not at liberty to look into it for the purpose of seeing what are amendments and what constitutes original matter. Well, supposing that to be true, as a general proposition, what have I upon the record? I have a bill (taking the amended bill as constituting the record of the bill) which states a great variety of matters, as to by far the greater part of which there is an answer; and I have also a demurrer to the whole, that is, to all that which has been already answered. I have thus a demurrer and an answer applicable to the same bill. It is clear that if this demurrer had been now put into the original bill, it could not have been sustained. And if I am to look at the amended bill as one record, and to look also at the answer as part of the same record, there is an answer to a part of that which the defendant, by demurrer, says he is not bound to answer; so that the answer overrules the demurrer.

"In considering the answer to an amended bill, it is clear you must take the two answers together, the two constituting the entire answer to the bill as it exists after the amendment. The defendant cannot justify repeating, by his answer to the amended bill, what he has stated in answer to the original bill, for it would clearly be impertinent for him to do so. He may introduce anything qualifying his former statements; but he cannot substantially repeat what he has said in his former answer, because to that there is already an answer, and all he has to do is to complete the record. He can no more demur to that which he has before

answered than he can answer it. This appears to be so perfectly clear in pleading and principle that I am glad to hear the Vice Chancellor has not expressed any opinion the other way.

"What would be the course if the circumstance were such as Lord Eldon in Ritchie v. Aylwin (15 Ves. 79) supposed might arise, it is unnecessary for me to consider. The case supposed by his Lordship might certainly occur; that is to say, the plaintiff might, after answer, so amend his bill as to make an entirely new case, so that the original bill would be, as Lord Eldon expresses it, *in nubibus;* and, of course, the answer to it would follow the same fate. Lord Eldon thought he could not let in the plaintiff to make, by way of amendment, what was virtually a new case, without also leaving it open to the defendant, in some way or other, to avail himself of the same defense as he might have resorted to had the case been brought forward at first. One sees the justice of that * * *

"*If, however, the case upon the amended bill is not a different, but substantially the same case, no such difficulty can arise.* Accordingly, in Atkinson v. Hanway (1 Cox 360), although the barons differed as to the mode of dealing with the objection, they all concurred in the conclusion, that if the same matter was the subject both of an answer and a demurrer, the answer overruled the demurrer; and that just as much where one was to the original and the other to the amended bill, as where both were to the amended bill. I never entertained the least doubt that such must be the conclusion if the facts brought the case up to it."

In Attorney-General v. Cooper, 8 Hare 166, an information and bill was filed to enforce the performance of the trusts upon which some of the defendants were seized of a meeting-house and premises—for an account of moneys which had been received on like trusts, under

a will; to have it declared that J. B. M'Crea, one of the plaintiffs, continue the lawful minister of the congregation of said meeting-house and to restrain the trustees from preventing him from officiating as such minister. John Smith, one of the defendants, answered the original bill. The bill was then amended, by introducing other statements, to show the constitution of the society or congregation, the regularity of the appointment of the plaintiff, M'Crea, as the minister, and the illegality of the proceedings adopted for removing him. The original bill had asked for the appointment of new trustees of the meeting-house and other property. The amended bill stated that the defendant, John Smith, was a member of the congregation; and in the amended bill the prayer for the appointment of new trustees of the property bequeathed by the will was omitted. To the amended bill John Smith demurred for want of equity, want of parties, misjoinder of plaintiffs and multifariousness.

Attorneys for the demurrer, relied first, upon Wyllie v. Ellice (6 Hare 505) as establishing the proposition that the defendant might demur to the amended bill, notwithstanding he had answered the original bill, and even supposing the substance of the case remained the same.

The Vice Chancellor expressed his opinion to be, that the alteration by the amendment had not, with reference to the demurrer, raised any case which had been excluded by the original bill; and proceeded,

> "If it were not for the case of Wyllie v. Ellice there would have been no pretence for this de-

murrer. I take it to be clear, that when a party has answered an original bill, he cannot demur to the bill, when it is amended, unless the amendment makes what Lord Eldon has described as a new case. If it were otherwise, a new sort of practice would be introduced."

The Vice Chancellor then proceeds to review and distinguish Wyllie v. Ellice as having changed the parties, etc., by the amended bill, and concluding with respect to that case:

"It was upon that ground that I decided the case of Wyllie v. Ellice. If it be true that the legitimate consequences of that decision be such as are now pressed upon me, I must reconsider Wyllie v. Ellice. I do not think that I have ever decided, or intended to decide, that the fact of a party having answered the original bill is not to be regarded upon the argument of a demurrer to an amended bill.

"Now, in this case, the original information and bill was open to all the objections which arise on the amended information; *and where a party has passed by the time at which he might demur, I think his right to demur does not revive upon the amendment of the bill, by simply praying relief in substance of the same nature as that which was prayed before.* It would be carrying the case of Wyllie v. Ellice very much farther than is necessary;—if not, as I have said, I must reconsider it.

"I think this demurrer must be overruled. I decide it upon the ground that the defendant ought to have taken these objections before, if the objections be valid ones."

The foregoing cases bring the English practice down to the time of adoption (1842) of the rule laid down in present Equity Rule 32, which latter rule was a re-adoption of former Rule 46. The Supreme Court hav-

ing adopted a rule in the premises in 1842, that rule has, since its adoption, continued to control in our federal courts.

As showing that the practice of State Courts is in harmony with the English Rule and Equity Rules 46 (old) and 32 (new), we cite the following state court decisions:

Booth v. Stamper, 10 Ga. (l. c.) 113 et seq.:

> "When the plaintiff is allowed to amend, it is clearly right that defendant should be allowed to demur to the amendment, and if the amendment is material, that is, if it varies the case made in the original bill, it is equally clear that the defendant ought to have the right to demur to the bill as amended, even if he has once demurred and been overruled I see the most satisfactory reasons for all this, but I must say, that I see no good reason for allowing a second demurrer to a bill because an immaterial and trivial amendment has been made.
>
> "However, the right to demur a second time to the whole bill, upon amendment made, applies to cases when the amendment is made and demurrer filed before the answer is put in. For it is also a general rule of Equity practice, that a defendant cannot, after he has answered the original bill, if the plaintiff amends it, put in a general demurrer to the whole bill, because the answer will overrule the demurrer. If, however, the defendant has answered the original bill and an amendment has been made, which materially varies the case made against the demurring party, he will be entitled to demur to the whole bill as amended, even though he may have demurred to its unsuccessfully before amendment."

In Sanchez v. The Electrovibration Co., 4 App. Cas. (D. C.) 453, it was held that, while a defendant in equity cannot, in general, after he has answered the original

bill, put in a general demurrer to the amended bill, he can do so if the nature of the case made by the original bill has been changed by the amendment; quoting Daniell's to the effect that

> "An amendment of the bill, however, does not enable a defendant who has answered the original bill to demur to an amended bill upon any causes of demurrer to which the original bill was open,"

and

> "A defendant in general, after he has answered the original bill, cannot put in a general demurrer to the amended bill, because the answer to the original bill, being still in the record, will in fact overrule the demurrer."

The Supreme Court of Illinois, in Bond v. Pennsylvania Company, 171 Ill. 508; 49 N. E. 546, lays down the rule in the following concise language:

> "The first point made on this record is that, after appellee had answered the original bill, it could not demur to the amended bill upon any ground alleged previous to its answer. The reasons set forth in the last demurrer are that appellant had not, in or by his amended bill, made or stated a case which ought to entitle him to any relief. Inasmuch as appellee had answered the original bill, and, after demurring to it as first amended, asked leave to have its answer stand to the bill as amended, it was precluded from demurring to the bill as secondly amended on any ground that had already been answered, for one cannot answer and demur to the same matter at the same time; and after having answered the original bill, if the same is amended, the defendant cannot put in a general demurrer to the whole bill, because the answer will overrule the demurrer. The right to demur a second time to the whole bill, upon amendment made, applies only to cases where the amendment is

made and the demurrer filed before the answer is put in. Appellee should have confined its demurrer to the matter set up in the last amendment. 1 Enc. Pl. & Pr. 491; 6 Enc. Pl. & Pr., 414, 430; 1 Daniell, Ch. Prac. (6th Am. Ed.) 409. The last amendment did not abandon any of the original grounds for relief, but set up an additional ground."

And so has the rule been declared in Tennessee, the Supreme Court, in State v. Mitchell, 104 Tenn. 336, 58 S. W. 367, saying:

"The general rule is that *an amendment of a bill does not enable a defendant who has answered the original bill to demur to the amended bill upon any cause of demurrer to which the original bill was open.* 1 Daniell, Ch. Prac., 409. 'It was in consequence of the two bills being considered as one that where the defendant has answered the original bill a demurrer to the new bill, which contains matter already answered, will either be taken from the files, as irregular, or considered as overruled by the answer.' Atkinson v. Hanway, 1 Cov. Ch. 360; Ellice v. Goodson, 3 Mylne & C. 653; Dillon v. Davis, 3 Tenn. Ch. 395. 'But if the plaintiff so amend his bill as to make an entirely new case, leaving the original bill, as Lord Eldon expresses it, in nubibus, the answer must be treated as in the clouds, also, and a demurrer would be in order.' Ritchie v. Aylwin, 15 Ves. 79; Cresy v. Bevan, 13 Sim. 354." * * *

"The fourth ground of demurrer challenged the right of a stockholder to maintain such a bill for the use and benefit of the corporation, without requesting the board of directors to prosecute the suit. It must be conceded that this last ground of demurrer was open to defendants when they answered the original bill, and ordinarily the answer to the original bill would preclude the right to demur to the amended bill for this cause. But the amended and supplemental bill undertakes to allege a state

> of facts showing the disqualification of the directors to institute or conduct the litigation, and in other respects, already mentioned, the amended bill makes *an entirely new case.* Hence we think defendants were not precluded by their answer to the original bill from demurring to the amended and supplemental bill."

In Lynn & Co. v. Andrews, 180 Mass. 527; 62 N. E. 1061, the Supreme Court of Massachusetts held that a demurrer to the declaration filed after an amendment *adding a second count* to the original declaration, to which a general answer was filed, must be *restricted* to the *added count,* or to some impropriety in joining the two counts in the same declaration.

In Railroad Company v. Beggs, 85 Ill. 80; 28 Am. Rep. 613, the court said:

> "At a subsequent term there was an amended declaration filed, not differing substantially from the original, except more particularly alleging the duty to provide safe, sure and well constructed and sound railroad bed and track, and sure and safe cross-ties; averring defendants did not furnish same * * * etc.
>
> "It would appear from the transcript before us, there was a general demurrer to the original declaration, but as a plea in bar was subsequently filed, the demurrer was waived.
>
> Defendants below, after the issue had been made up, and the amended declaration filed, put in a plea to the jurisdiction of the court * * *
>
> "This plea, on motion of plaintiff, was stricken from the files, and this is the first error alleged.
>
> "We think there was no error in striking this plea from the files. The amended declaration did not make a new or different case from that set out in the original declaration, to which the general

> issue had been pleaded and issue made up. There was then on file a plea to the merits, which admitted jurisdiction, and it was too late to plead specially to the jurisdiction."

And such is the rule in California, the Supreme Court saying in Wood v. Curry, 49 Cal. 361:

> "The objection that the remedy of the plaintiff was by motion in the original cause, and not by bill in equity, even if well founded in practice (a question upon which we express no opinion) will not be considered. The defendant made no motion in the court below to dismiss the bill, on that or any other ground, but answered to the merits. The cause was then referred to a referee. Under these circumstances, the objection upon the point of procedure made for the first time before the referee, came too late."

And again in Thompson v. Laughlin, 91 Cal. 318:

> " * * * the defendant waived any objection to the remedy (injunction) by answering, without first moving to dismiss the action, on the ground that plaintiff should have proceeded by motion (Wood v. Curry, 49 Cal. 359.)"

In Bank of Woodland v. Heron, 122 Cal. 107 (110), it is said, in referring to the right of a defendant, who had answered, to set up a new defense, the same principle being involved:

> "For it is not sufficient that the new defense proposed be a legal defense; it should also be an equitable defense. (Harding v. Minear, 54 Cal. 502, 506.) This defense under the circumstances was highly inequitable. In Cooke v. Spears, supra, the trial court refused to allow the plea of the statute of limitations by way of amendment, and this court upheld the ruling upon the ground that the amendment was not in furtherance of justice. *'It was*

claimed solely as a legal advantage, to which at one time he would have been entitled; but it is a wise conservation that it should have but its day in pleading and no grace of right after, beyond the extent of justice.' ''

The right of a defendant who has once answered to the merits to do other than file a new or supplemental answer within the time allowed under Rule 32, by no conceivable method can be construed to extend beyond the time of an order of court made in that behalf, and under Equity Rule 32, "unless it is otherwise ordered," the defendant must answer again, and may not do otherwise than answer. The rule has been extended much further, many authorities holding that a defendant cannot even answer except as to the new matter.

Winton Motor Carriage Co. v. Blomberg, (Wash.) 147 Pac. 21;

Dyer v. Cramston Print Works Co., 20 R. I. 143; 37 Atl. 632;

Casserly v. Waite, 124 Mich. 157; 82 N. W. 841; 83 Am. St. Rep. 320, and cases hereinabove cited.

In Winton Motor Carriage Co. v. Blomberg, supra, the Court held that where, in a seller's action to replevin an automobile conditionally sold, every issue raised in defendant's answer to the amended complaint by way of counterclaim could have been raised by answer to the original complaint, it was not error to strike from such answer allegations presenting such issue, saying:

"Every issue raised in the subsequent answer to the amended complaint by way of counterclaim for damages for breach of warranty and for a return

of the purchase price paid on the large car could have been raised by answer to the original complaint. By his failure to answer the allegations touching the large car in the original complaint, and stipulating, in the words of his counsel, that

'the only dispute is about the small car',

the appellant waived these claims. Having been waived as matter of defense and counterclaim to the complaint so far as it originally related to the large car, they could not thereafter be asserted as matter of defense and counterclaim to the amended complaint relating solely to the small car. Having waived these matters in the transaction out of which they arose, he waived them for all purposes."

Casserly v. Waite, supra, contains a very satisfactory discussion of this subject, the Court saying:

"It is also contended by relator that complainant having amended its bill, even by bringing in the contractor as a party defendant, relator had the right to file an answer to the amended bill setting up new defenses, or contradictory defenses to those contained in the answer to the original bill. On the other hand, it is contended by counsel for respondant that where a bill is amended, the answer having already been put in, the defendant, if he answers, should answer only as to new matters introduced by the amendment. In this we think counsel for respondent are correct. The amendment to the bill by adding a new party defendant in no way changed the cause of action as stated in the bill, and in no way affected defendant's rights. The amendment was purely formal. It introduced no new matter into the bill, and there was, therefore, nothing in the amendment requiring a further answer by defendant. * * *

"Puterbaugh on Chancery Practice, third edition, 118, lays down the rule that:

'In answering an amended bill, the defendant, if he has answered the original bill, should answer

only those matters which have been introduced by the amendments. In fact, the answer to an amended bill constitutes, together with the answer to the original bill, but one record.'

"The same rule is laid down in Jennings on Chancery Practice, 89. See, also, 1 Barb. Ch. 159, and 1 Daniell's Chancery Practice, 729.

"In Salisbury v. Miller, 14 Mich. 160, it was said:

'It is claimed that it was irregular to proceed to a hearing after the bill was amended without a further answer from Miller or a default. Had any new matter been introduced into the bill, he would have had a right to answer further; but where nothing but the name of a new defendant was introduced, no such step was required, as it in no way changed the aspect of the suit against Miller.'

"See, also, Munch v. Shabel, 37 Mich. 166: But counsel for relator cite 1 Daniell Chancery Practice, 409, as follows:

'Any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer making an entirely new defense, and contradicting his former answer.'

"It is contended by counsel for respondent that this rule laid down by Daniell is in conflict with the rule already stated by the same author; that it is broader than the authorities cited for it warrant; and that, giving it the most favorable construction possible, it cannot be held to apply to cases like the one at bar. We are satisfied that the rule laid down by Daniell could not be applied to a case like the present, even if it is the rule applied in some cases."

Dyer v. Cramston Print Works Co., supra, was a case where, on the death of one of the complainants, a bill was amended to obviate the necessity of a bill of

revivor, and the Supreme Court held that defendant was not entitled to set up defenses not contained in his original answer except such as related to matters set forth in the amendment.

However, in federal court practice, under Equity Rule 32, a defendant is required to file a new or supplemental answer unless it should be otherwise ordered by the court:

> "If an amended bill is filed after the original bill has been answered, a pro confesso may be taken against the defendant if he fails to answer the amended bill within the time prescribed by rule or statute unless the time is enlarged. (U. S. Eq. Rule 32.)"
>
> 10 R. C. L. 537.

The rule stated in the foregoing quotation from Ruling Case Law has been followed in principle, though not by direct reference to the rule itself, in numerous federal court decisions, as an instance of which we cite the following:

> "In general, when a court of equity has jurisdiction of the subject matter, the defendant, after the plea or answer is filed, cannot raise, as a new defense, the objection that the legal remedy is plain, adequate and complete. The defense should be taken by demurrer, when apparent on the bill."
>
> Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. (l. c.) 1008, 9.

The rule is founded upon waiver, by defendant, of all technical objections by once answering to the merits.

> "These defendants, therefore, knowing, as they must have done, that the object of bringing them in at all was in order that their claims should be cut

off by the decree, and not having raised the objection of multifariousness until now, come within the scope of the doctrine repeatedly declared by the supreme court, that, if the matters were of equitable cognizance, the objection must be raised in limine, and, if not then made, it should not be entertained. Oliver v. Piatt, 3 How. 333; Nelson v. Hill, 5 How. 127; Story, Eq. Pl., Sec. 284a."

Converse v. Michigan Dairy Co., 45 Fed. 20.

"It is contended by counsel for the appellant that the court erred in overruling his motion to dismiss these causes on the ground that the appellees had a plain and adequate remedy at law." * * * "But, if there had been no waiver, the objection came too late. If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. 1 Daniell, Ch. Pr. (4th Amer. Ed.) p. 555; Reynes v. Dumont, 130 U. S. 395, 9 Sup. Ct. Rep. 486; New Orleans v. Morris, 105 U. S. 600. Good faith and an early assertion of rights are as essential on the part of the defendant as of the complainant. Brown v. Iron Co., 134 U. S. 530, 10 Sup. Ct. Rep. 604."

Levi v. Evans, 57 Fed. 687.

"The objection that an action should have been brought at law instead of in equity, or vice versa, is waived by a failure to interpose it at the proper time in the court of original jurisdiction. Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127; Insley v. U. S., 150 U. S. 512, 14 Sup. Ct. 158; Preteca v. Land-Grant Co., 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340; Reynes v. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486. If a party, when sued at law, conceives that the action, or any material issue in it, is of equitable cognizance, *he must interpose the objection at the threshold of the case* and will

not be heard to make it for the first time in the appellate court."

Union Pac. Ry. Co. v. Harris, 63 Fed. 803.

"It is further urged that it now appears that the complainant has a full, complete, and adequate remedy at law. The general rule is that the objection that the complainant has a complete and adequate remedy at law should be taken at the earliest opportunity, and, if not so taken, the court having the general jurisdiction will exericse it."

Western Electric Co. v. Reedy, 66 Fed. 164.

"The point is made that an action to recover the value in money of lands sold cannot be joined with a suit to cancel patents for other lands, and that the case proven shows no ground of equitable jurisdiction as to the several tracts of land sold by the appellants. But there was no demurrer to the bill, or plea to the jurisdiction in equity. By answering to the merits the appellants waived any right they may have had to object to the power of the court to deal with the case as one in equity, the court having the power to grant the relief sought. Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; Brown v. Lake Superior Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021; Insley v. United States, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163; Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113. See, also, Southern Pacific Railroad Co. v. United States (decided by this court at the present term) 133 Fed. 651."

Southern Pac. R. Co. v. United States, 133 Fed. 669.

"(2) It is not clear why plaintiff's remedy at law was not adequate. The claim of fraud is not alone sufficient to give equity jurisdiction. U. S. v.

Bitter Root Co., 200 U. S. 451, 472, 26 Sup. Ct. 318, 50 L. Ed. 550. However, a bill which seeks rescission on the ground of fraud is within a recognized head of equity jurisprudence (Tyler v. Savage, 143 U. S. 79, 95, 12 Sup. Ct. 340, 36 L. Ed. 82), and, in such a case, *the question whether the suit is rightfully brought on the equity side* will not be raised by the court on its own motion, but *must be presented by the defendant at the first opportunity.* (Toledo Co. v. Computing Co. (C. C. A. 6) 142 Fed. 919, 923, 74 C. C. A. 89; Warmath v. O'Daniel (C. C. A. 6) 159 Fed. 87, 91, 86 C. C. A. 277, 16 L. R. A. (N. S.) 414.)''

National Leather Co v. Roberts, 221 Fed. 925.

''And, in addition to these considerations, we think we ought not to regard with favor the raising of this objection, for the first time, at this stage of the cause.

''The rule as stated in Daniell's Chancery Practice (Vol. 1, p. 555, 4th Am. edition), is that if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it; and in a note on page 550, many cases are cited to establish that 'If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject matter.'

''In Wylie v. Coxe, 56 U. S. 15 How. 415, 420 (14: 753, 755), it is said: 'The want of jurisdiction, if relied on by the defendants, should have been alleged by plea or answer. It is too late to raise such an objection on the hearing in the appellate

court, unless the want of jurisdiction is apparent on the face of the bill.'

"It was held in Lewis v. Cocks, 90 U. S. 23 Wall. 466 (23:70), that if the court, upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by the counsel. To the same effect is Oelrichs v. Spain, 82 U. S. 15 Wall. 211 (21:43). The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery, at the pleasure of the parties interested; but it by no means follows, where the subject matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late even though, if taken in limine, it might have been worthy of attention."

Reynes v. Dumont, 130 U. S. 354; 32 L. ed. 934, 945.

"The point is also pressed that the remedy at law was plain, adequate and complete, and jurisdiction in equity therefore wanting. We do not understand counsel to repudiate the stipulation, or to suggest multifariousness or any objection arising upon the rather unusual mode pursued to secure a conclusion in four cases rolled into one, but to contend that the determination of all the matters in issue belongs on the law side of the court. The defendants fully answered the bill, and raised no such objection, and the cause being at issue, and evidence taken, it was ordered on the 23d of February, 1883, by consent, to be heard by the general term in the first instance. On the 24th of March,

1884, the defendant moved to dismiss on the ground of the adequacy of the remedy at law. We have had occasion recently to remark that where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject matter, this objection should be taken at the earliest opportunity and before the defendants enter upon a full defense. Reynes v. Dumont, 130 U. S. 354 (ante, 934)."

Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005, 1008.

"But were it conceded that the bill was defective; that a demurrer must have been sustained; and that the appellant, if it had so chosen to act in the first instance, could have defended its possession and defeated the action,—still the decree of the circuit court must be sustained. Whatever rights of objection and defense the appellant had, it lost by inaction and acquiescence." * * * "After a lapse of nine months,—suddenly its policy changed —it contested where theretofore it had acquiesced."

Brown, Bonnell & Co. v. Lake Superior Iron Co., 134 U. S. 530; 32 L. ed., 1021, 1024.

"It is urged, however, that this court has sustained the validity of proceedings and decrees in suits of this nature, in which it appeared that the plaintiffs had not exhausted their remedies at law, and the cases of Sage v. Memphis & L. R. R. Co. 125 U. S. 361 (31:694), and Mellen v. Moline Malleable Iron Works, 131 U. S. 352 (33:178), are cited as illustrations. But passing by other matters disclosed by the facts of those cases, it will be noticed that in neither of them was the objection made at the outset, and when action on the part of the court was invoked. Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the

> scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal."
>
> * * * "If there was a defense existing to the bills as framed, an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defense and objection which must be made in limine, and does not of itself oust the court of jurisdiction. This doctrine has been recognized not merely in the cases cited, but also in those of Reynes v. Dumont, 130 U. S. 354 (32: 934); Kilbourn v. Sunderland, 130 U. S. 505 (32: 1005); Brown v. Lake Superior Iron Co. 134 U. S. 530 (33: 1021)."
>
> Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 37 L. ed. 1113, 1115.

It is elementary that all objections on technical grounds may be waived.

In Dennison v. Chapman, 105 Cal. 447, it is said:

> "There was no demurrer interposed to the complaint. It follows, therefore, that all merely technical objections are waived."

In Hollins v. Brierfield Coal Co., 150 U. S. 371; 37 L. ed. 1113, 1115, it is said:

> "Defenses existing in Equity suits may be waived just as they may in law actions, and when waived the cases stand as though the objection never existed."

Certainly then, objections, grounds for which exist at the time of answering and are not raised by answer or motion, thereby being waived, may not be revived by a defendant, if the case stands after waiver "as though the objection never existed."

Rule 29 provides that all objections shall be taken by motion or answer.

The defendants made no objection by answer to proceeding in equity nor any objection whatever until within a few days of date of trial at Sacramento in May, 1915. In March, 1915, the cases were regularly set for trial without objection (Tr. p. 20). During all this time no motion was interposed, a full answer to the merits had been made, and no objection to proceeding in equity, nor any other objection, was made upon any ground.

If appellees wished to object, they should have objected at "the threshold",—"in limine",—"at the outset", "at the earliest opportunity", as the opinions variously put it, but, instead of doing so, they waived their right to object and consented in open court to the trial of the suits at Sacramento on May 25, 1915 (Tr. p. 78, 2nd par.).

As is said in Brown, Bonnell & Co. v. Lake Superior Iron Co., supra,

> "after a lapse of nine months,—suddenly their policy changed—they contest where theretofore they had acquiesced."

and as was said in that case,

> " * * * whatever rights of objection and defense the appellants (appellees) had, they lost by inaction and acquiescence."

It is the rule in all jurisdictions that, if technical objections are not taken at the earliest opportunity, they are waived. In Tingley v. Times Mirror, 151 Cal. 13, it is said:

> "If there is a defect in parties plaintiff apparent upon the face of the complaint, or if it appear therefrom that plaintiff has not the legal capacity to sue, the objection on either of these grounds must be taken by demurrer, or is waived. If these matters do not appear on the face of the complaint, any objection or defense as to them must be taken advantage of by answer, or is deemed to be waived. (Code Civ. Proc. secs. 430, 433, 434.)
>
> Now the earliest opportunity available to the defendant, as these objections could not be urged on the face of the complaint, was to take advantage of them in the original answer, which it did not do."

and the same rule applies to all technical objections, Dennison v. Chapman, supra.

Equity Rule 32 recognizes that, if technical objections to proceeding under a bill filed and served in equity are not made before a defendant answers or in the answer, they are waived, provided, of course, it be competent for a court of equity to grant the relief prayed.

Rule 46, of the Equity Rules of 1842, was substantially the same as new Equity Rule 32. Rule 46 provided:

> "In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer."

It will be noted that nothing is said about putting in a demurrer or plea and this was the rule regarding proceedings after answer before demurrers and pleas were abolished in equity in federal court practice.

It will also be noted that in all other instances under the Rules of 1842, where the rights and duties of defendants in regard to pleadings originally are referred to, the following language is used:

> "it shall be the duty of the defendant to file his plea, demurrer or answer to the bill" (Rule 18); "whenever an injunction is asked for by the bill * * * if the defendant do not enter his appearance and plead, demur or answer" (Rule 55); "it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill" (Rule 94).

It is but reasonable to assume that the Supreme Court had this former rule and practice in mind when drafting the present rules respecting the procedure after amendment; and that it was not intended to alter the entire federal court practice upon a matter founded upon the very principle which prompted the adoption of the New Rules, namely, elimination of all non-meritorious avenues of delay. Manifestly, a defendant could not, under the old rules, demur to an amended bill on any ground to which the original bill was open. The fact, then, that under the new rules, a defendant may raise by answer questions of law which might have been raised theretofore by demurrer, and that the new rules permit of an answer being filed after amendment, does not mean that a defendant, who has once answered to the merits, can come in, on an immaterial amendment being made, and, in effect, demur to the amended bill on any ground to which the original bill was open. It is manifest that such was not the intention of the Supreme Court, unless it be that it was the intention to overthrow all estab-

lished precedent and practice from the earliest proceedings in the High Court of Chancery of England and uniform in chancery courts, both of the United States and of the several States. Such contention could hardly be maintained.

By comparing New Rule 32 with New Rules 12 and 16, the same distinction in use of language will be noted as in the Rules of 1842, and the meaning appears clear and certain. Rule 12 is directed to the first filing on the part of the defendant and permits the defendant to "file his answer or other defense."

Likewise Rule 16 applies to the first filing on the part of the defendant and permits the defendant "to file his answer or other defense."

To hold that a defendant may move to dismiss under the circumstances contemplated in Rule 32 would be to hold that the Supreme Court unintentionally omitted from the rule the words, "or other defense." This charge we shall not suggest that appellees will impute to that court.

Conceding, then, for the sake of argument merely, that the word "answer", as used in Rule 32, read in connection with the same word in Rule 29, could be construed broadly enough, by stretch of imagination, to permit defendant, since he can answer the amended bill, to raise technical objections in his answer thereto, still it remains unanswerable that Rule 32 makes no provision for filing "other defenses", and that is what the defendants herein have endeavored to do.

Every one of the cases which hold defendant to a waiver of technical objections by answering to the merits is a recognition of the reasoning and principle underlying Rule 32, which is that, having answered to the merits, a defendant must go to trial in the cause and if the complainant amends after the defendant has answered, the defendant must answer and answer alone, unless the court (upon cause shown) shall otherwise order.

Having therefore waived all objection to proceeding in the cause in equity and all other technical objections at the time when the complainants filed amended bills, the defendants were privileged to "file a new or supplemental answer" alone (Equity Rule 32), to the amended bills.

The suits should not have been dismissed, because the appellees waived their right to object to the jurisdiction in equity or upon any other technical grounds.

IF THE AMENDED BILLS OF COMPLAINT DO NOT STATE FACTS SUFFICIENT TO CONSTITUTE A VALID CAUSE OF ACTION IN EQUITY, THE SUITS SHOULD HAVE BEEN TRANSFERRED TO THE LAW SIDE OF THE COURT.

Equity Rule 22.

Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 769 (775); Id. 216 Fed. 382 (383);
Corsicano Nat. Bank v. Johnson, 218 Fed. 822;
United States v. Utah Power and Light Co., 208 Fed. 822.

It is apparent upon the record that complainants made no attempt to state a cause of action at law in damages, because of the inadequacy of such a remedy, yet if complainants show, by their amended bills of complaint, a justiciable cause, but not sufficient facts to make the same cognizable in equity, the suits should have been transferred to the law side with only such alteration in the pleadings as would be essential.

IN NO EVENT SHOULD THE SUITS HAVE BEEN DISMISSED ABSOLUTELY, BUT IF DISMISSED AT ALL, THE DECREE OF DISMISSAL SHOULD HAVE BEEN WITHOUT PREJUDICE TO AN ACTION AT LAW.

> "We observe, however, that the decree dismissing the bill is general, and does not preserve to the appellant her right to sue at law, if she so elects. The case is therefore remanded to the circuit court with directions to add to the existing decree a clause that the dismissal ordered is without prejudice to the complainant's right to sue at law."
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> Sanders v. Devereux, 60 Fed. 316;
>
> Hollins v. Brierfield Coal and Iron Co., 150 U. S. 371; 37 L. ed. 1114 (1118).

THE DEFENDANTS HAVING FAILED TO FILE A NEW OR SUPPLEMENTAL ANSWER TO THE AMENDED BILLS OF COMPLAINT, BECAME, AND NOW REMAIN, IN DEFAULT UNDER EQUITY RULE 32.

Appellants applied for orders for decrees pro confesso which were entered by the clerk of the lower court (Tr.

p. 40). The court set aside said order upon the ground that the same had been inadvertently and inadvisedly entered.

Appellants consider the merit of their position with reference to the decrees pro confesso entered under the foregoing rule to lie in three matters, viz.: (1) the purpose of the rules to speed causes to final determination by eliminating causes of delay, and the rights of litigants to be protected against such disregard of the rules as will defeat that purpose; (2) the existence, at the time the appellees answered, of all the grounds of objection later made by appellees; (3) the reliance by appellants upon the waiver of defendants and the fixed status of the suits as at issue and ready for trial for six months prior to May, 1915.

It has already been pointed out that Rule 32 is declaratory or expressive of a principle announced and applied in many cases; viz., answering to the merits, without objection, waives all objections which may be waived.

The main purpose of the rules, prevention of delay, is afforded its chief means of accomplishment in Rule 32, taken in connection with Rules 29, 22, and 23.

As is said in Boyd v. N. Y. & H. R. Co., 220 Fed. 178:

> "There is nothing novel in embodying and presenting legal propositions in the answer. * * * What is new is the obligation on defendant to show all his propositions at once, whether of fact or law."

Again in the same case we find:

> "Many a judge has heard in succession a demurrer, a plea or two, and several motions before getting to the answer and never seen or thought

> he had a right to see the whole defense at a glance. Whether the panorama now afforded is real reform depends almost altogether upon how sympathetically and skillfully the new procedure is administered."

Again, as indicating the spirit of the new rules, it is said in Goldschmidt Thermit Co. v. Primos Chemical Co., 225 Fed. 775:

> "The administrative policy enjoined upon us by these rules is not to permit plaintiffs to be hampered by procedure objections on the ground that complaint had been made to the wrong court."

The "spirit and intendment" is to bring defendant to answer and to hold the case in such status that the questions raised can be decided in the full light of all the information obtainable. As is said in Boyd v. H. R. Co., supra,

> "One who 'demurs generally' nowadays must be understood to do so not only on what complainant shows but also after having his own conscience purged. Thus only is avoided the old and bad habit of trying everything else before stating facts."

Of course, the equity rules have all the force of statutes and of decisions of the United States Supreme Court, and have the effect of such upon all courts subject to them; "they must be applied in all cases that fall within them" (15 L. ed. 901, note, citing cases).

It becomes material, therefore, to consider the meaning of Equity Rule 32; its meaning becomes important, for it controls the court upon this point. While the rule has never been construed in any decision by express reference to it, it has often been approved in principle

and applied. We refer to the preceding authorities on the question of waiver. We might add that when the United States Supreme Court reversed the decree in the case of Thompson v. The Maxwell Land Co., 95 U. S. 391; 24 L. ed. 481 (485), with directions that the "complainants be allowed to amend their bill and that the defendants be at liberty to answer any new matter introduced therein," the principle of the rule was recognized.

The language of the rule is direct, plain and unequivocal: "in every case" [Webster says of "every" that "not one of all considered is excepted" and the Standard Dictionary that it "makes no exception and extends to all"] "where an amendment to the bill shall be made after answer filed"—concededly the situation in the pending record; the defendants answered to the merits, that is, they put in allegations of fact in defense, that being the only meaning in which the word "answer" is used in the rules, new or old, in the several dozens of times in which it is used, as a reference to the rules shows—"the defendant shall put in a new or supplemental answer"—that being the only step open and the word "answer" having clearly the same meaning that it has in the many instances of its use throughout the rules.

If the meaning of the rule be plain, free from ambiguity, it is the duty of the court to give it effect:

> "And when a statute is plain and its meaning is certain, construction has no place or office. The conclusive legal presumption is that the legislative body meant what it said, and the duty of the courts is to give effect to its acts, not to amend or repeal

them. Brun v. Mann, 151 Fed. 145, 157, 80 C. C. A. 513, 525, 12 L. R. A. (N. S.) 154; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; Johnson v. Southern Pac. Co., 117 Fed. 462, 465, 54 C. C. A. 508, 511; Swarts v. Siegel, 117 Fed. 13, 18, 19, 54 C. C. A. 399, 404, 405; St. Paul, M. & M. Ry. Co. v. Sage, 71 Fed. 40, 47, 17 C. C. A. 558, 565; Webber v. St. Paul City Ry. Co., 97 Fed. 140, 144, 38 C. C. A. 79, 83; Grainger & Co. v. Riley, 201 Fed. 901, 904, 120 C. C. A. 415, 418; United States v. Alamorgordo Lumber Co., 202 Fed. 700, 706, 121 C. C. A. 162, 168; First Nat. Bank v. United States, 206 Fed. 374, 377, 378, 124 C. C. A. 256, 259, 260, 46 L. R. A. (N. S.) 1139; Soliss v. General Electric Co., 213 Fed. 204, 207, 129 C. C. A. 548, 551."

Sweet v. United States, 228 Fed. 321 (423) (advance issue No. 5, March 2, 1916).

Rules 12, 16 and 29 are general rules as to when and in what form pleading may be made in the beginning by a defendant. Rule 32 is a specific rule covering "every case" where an amendment is filed "after answer" and limits the pleading to "a new or supplemental answer" by the defendant, and must have been adopted for the acknowledged purpose of the rules, namely, in aid of speeding the cause and preventing delay in proceedings. A specific statute (rule) always prevails over a general statute.

If a defendant answers (and does not make but by silence waives the making of any other defense), and the bill is amended, then (Rule 32) "in every case where an amendment shall be made after answer filed the defendant shall put in a new or supplemental answer. The rule does not say "or other defense".

He will have waived, in that suit, the making of other (technical) defenses, and, besides, the court wants to see the case in the light of the "purged conscience" of defendants, so the defendant is called upon to answer. The suit is in equity, and the court wants all the light that can be reasonably demanded of both parties. There is no provision under Rule 32 for the making of any other defense than by answer. It was open under Rule 29 to appellees to make "other defense" at the time of answering originally.

The amendments contain no allegation of fact, the existence of which was unknown to defendants at the time of answering and of which defendants could not and should not have availed themselves in their answer, under Rule 29. They did not do so, but waived their right to object upon all technical grounds. They objected later upon no ground which might not be waived by them.

> "But the rule (Section 723 of the Revised Statutes) was devised and the statute was enacted mainly to secure to the defendant the privilege of a trial by jury, and this he may waive. If in a suit in equity he answers and submits to the jurisdiction of the court, he cannot thereafter object that plaintiff has a plain, adequate and complete remedy at law, provided that the subject matter of the suit is of a class over which a Court of Chancery has jurisdiction and it is competent for the Court to grant the relief sought."
>
> Cobban v. Conklin, 208 Fed. 231 (234).

All waivable grounds of objection were open to defendants at the time of answering originally, whether such objections appeared upon the face of the bill or

did not appear upon the face of the bill, but existed within the knowledge of defendants.

"The object of a demurrer or plea, as a general rule, is to excuse the defendant from answering the bill on its merits. Both are dilatory pleadings,—a demurrer being proper if the fault of the complainant's case is apparent from the face of the bill, and a plea being proper if the fault must be shown by bringing matter dehors upon the record. Accordingly it has been generally said in the books that a party cannot demur or plead and answer the same matter, but he may demur to one part of the bill, plead to another, and answer to another. If he answers to the same part that he demurs to, his answer will overrule his demurrer. The rule is the same at law. 1 Chit. Pl. 512. The answer for the rule is thus given by Gilbert (Forum Rom. 58), in speaking of dilatory defenses:

" 'All these pleas with us are to be put in *ante litem contestam,* because they are pleas only why you should not answer; * * * so that, if you answer, your plea is waived.' This rule is laid down everywhere as expressive of the true function of a demurrer or plea in its relation to the answer. Mitf. Eq. Pl. (Tyler's Ed.) 304, 305, 411; Beames, Pl. Eq. 37; Whaley v. Dawson, 2 Schoules & L. 371; Jones v. Earl of Strafford, 3 P. Wms. 81; Oliver v. Piatt, 3 How. 412; Clark v. Phelps, 6 Johns. Ch. 214; Wade v. Pulsifer, 54 Vt. 71. * * *

"In this case it is urged that a court of equity has no jurisdiction as a court of law could give the orator an adequate remedy. This objection, if valid, is apparent upon the face of the bill, and so is the subject of a demurrer, and, if it be sustained, the case is at an end. But an objection to the jurisdiction of the court, if the court has general jurisdiction of the subject-matter, will not be entertained unless it is brought to a hearing before the expense of a trial upon the merits has been incurred. In 1 Daniell, Ch. Pr. 579, it is said that if the objection

> to the jurisdiction is not taken seasonably by plea or demurrer, and the defendant enters into his defense at large, the court having the general jurisdiction will exercise it. To the same effect are the cases: Society v. Trustees, 23 Pick. 148; Underhill v. Van Cortlandt, 2 Johns. Ch. 369; Bank v. Railroad Co., 28 Vt. 470. Indeed, the rule in equity appears to be the same as at law. A plea to the jurisdiction at law is said to be analogous to a plea in abatement, and is the earliest in the order of pleading; and, if the general issue be pleaded, the jurisdiction is confessed. So in equity it is a dilatory objection that is waived by an answer."
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> Holt v. Daniels, 17 Atl. 786-787.

The defendants should have filed a new or supplemental answer to the original bill, and not having done so appellants were entitled under Rule 32 to an order for a decree pro confesso as to the whole bill.

> "Although it is the practice to call a bill thus altered (by amendments) an 'amended bill,' the amendment is in fact esteemed but as a continuation of the original bill, and as forming part of it, for both the original bill and amended bill constitute but one record; so much so that, when an original bill is fully answered and amendments are afterwards made to which defendant does not answer, the whole record may be taken pro confesso generally. 1 Daniell, Ch. Prac. & Pl. (3rd Am. Ed., by Perkins) 403; French v. Hay, 22 Wall., at page 246."
>
> Excelsior Pebble Phosphate Co. v. Brown, 74 Fed. 323.

The orders having been properly entered should not have been set aside by the lower court but should have been allowed to stand and a final decree entered under Equity Rule 17. No application was made, on the

ground of inadvertence or mistake, for relief from the orders for decrees, but defendants stood flatly upon the legal ground that they were not in default. The record presented and now presents no ground for the interference with the orderly progression of the suit in equity under the new equity rules. No relief which the law does not entitle appellees to has ever been sought by them as touching the orders for decrees pro confesso.

Parties should be held to a compliance with the rules, for they have all the force of positive statutes; they control and must be respected to the point of compliance with them, otherwise it would be as was said of the very question in Green v. Elbert, 134 U. S. 615; 34 L. ed. 792:

> " * * * our regulations might become more honored in the breach than the observance, and the recognition of due procedure would be seriously weakened and impaired."

In Story's Equity Pleading, Section 454, it is said that,

> "The want of due form constitutes a just objection to the proceeding in every court of justice, for to reject all form would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice. Every irregularity of this sort is fraught with inconvenience, and generally tends to delays and doubts. And it has been well remarked that infinite mischief has been produced by the facility of courts of justice in overlooking errors of form. It encourages carelessness and places ignorance too much on a footing with knowledge amongst those who practice the drawing of pleadings."

Moreover, the appellees have no claim upon equity to assist them: The defendants (appellees) requested and received extensions of time in the early stage of the the suits in consideration of an agreement to answer (Tr. pp. 75, 76); in certain of the suits they received other extensions upon their written statement that they would not move to dismiss (Tr. pp. 81, 82); they received yet other extensions upon their written agreement not to oppose going to trial as soon as the cases could be reached for trial (Tr. pp. 75, 83, 84); in an affidavit of Wm. H. Devlin, one of the attorneys for appellees (Tr. p. 75), said Wm. H. Devlin is shown to have sent a telegram, dated July 31, 1914, to Burrell G. White, attorney for appellants, containing the following:

> "Have decided to answer in all cases in Federal Court. As this will take time I wish you would extend time to answer in all cases to and including the fifteenth of September. Will consent to cases going on next trial calendar if desired by you, or to be tried at next April term at Sacramento."

and in said affidavit it appears that said White replied by telegram the same day as follows (Tr. p. 76):

> "Your telegram of July 31st received. Your request is granted. If we are to wait so long however I think you should send me a rough synopsis of your defense so that the time of preparation may not be lost to me; also that depositions may possibly not have to be taken."

In an affidavit of said Burrell G. White (Tr. p. 81) it appears that Messrs. Devlin & Devlin, attorneys of record for appellees, wrote to said White as follows:

"Dear Sir:

As we do not intend to file a motion to dismiss the actions above referred to, the papers in which were served on September 4th, 1914, we shall be obliged if you will sign the enclosed stipulations, extending time of answer to and including October 20, 1914.

Very truly yours,

(Enc.) DEVLIN & DEVLIN."

That said White "signed the stipulations (Tr. p. 19) referred to in said letter and delivered the same to said Messrs. Devlin & Devlin"; that said Devlin & Devlin wrote to said White again as follows (Tr. p. 82):

"Dear Sir:

The motion to strike out parts of answer and motion for further and better particulars in the above-entitled action will be on the calendar in the United States District Court (2nd Division) on October 5th. Mr. William H. Devlin, who has charge of the matter, is at home ill and we should be obliged if you would consent to same being continued to October 26th.

Please advise, and oblige.

Very truly yours,

DEVLIN & DEVLIN."

and said White replied as follows (Tr. p. 83):

"Dear Sirs:—

Your letter of September 29th, 1914, has been received. I regret to learn of the illness of Mr. Devlin. Of course, under the circumstances, hearing of the motion will not be urged on October 5th, if Mr. Devlin is ill and cannot be present. It will therefore be understood that the matter will be continued to the next calling of the Calendar. The continuance will be with the further understanding that the motion will be heard at the next calling of the Calendar, and that no further continuance will be asked.

In connection with this matter, and the possibility of delay, I am reminded of an understanding, which I have with Mr. William H. Devlin, that when it comes to a trial the same may be set down for hearing at as early a date as may be agreeable to the court, and that no opposition to such a setting and time of trial by the defendants will be made.

If these matters be agreeable to you, please advise by return mail.

Very truly yours,

BURRELL G. WHITE."

to which last letter said Devlin & Devlin on October 1st, 1914, made the following reply (Tr. p. 84):

"Dear Sir:

Acknowledging receipt of yours of the 30th ult.: It is understood that the matter pending on October 5th, will be continued until the next calling of the calendar, at which time we shall be ready. So far as the trial of the case is concerned, there will be no effort, on our part to delay it. It is among the possibilities that Judge Van Fleet will prefer to try the case at Sacramento next April.

Very truly yours,

DEVLIN & DEVLIN."

The cases stood ready for trial for six months without objection being made to jurisdiction in equity; they were set for trial and complainants were permitted to go to within one week of date of trial before notice of any objection whatever. We submit the record as evidence of whether the subsequent conduct of appellees conformed to the letter or spirit of the promises and understanding between the parties made at a time when appellees were seeking the benefit of extensions of time which appellants willingly granted, as the record shows, in consideration of the promises given; also appellants

submit the record as to whether appellees are entitled to any assistance in equity.

Ownership of real property should not be difficult of determination. If a claimant has an interest in land, such interest is usually—all but necessarily—evidenced by some writing. Appellants offered in the lower court to set out in detail their claim of title, if appellees wished them to do so (Tr. p. 48, par. 1). They were not requested to set it out. Appellants, under Rule 20, called upon appellees by motion (Tr. p. 64) to state upon and under what instrument of title appellees claimed. An order that they do so was obtained in one of the suits from His Honor, Judge Dooling, presiding (Tr. p. 62), but was later set aside (Tr. p. 66). Appellees resisted, notwithstanding it must appear to this court that the setting out of the instrument forming the foundation of an alleged adverse claim of title to land would clearly be in the interest of the speedy administration of justice, perhaps determinative of the controversy and suit.

Philipps v. Philipps et al., 27 Weekly Rep. 436 Q. B. Div. (1879), was an action for the recovery of land wherein the plaintiff alleged title "by virtue of certain deeds, assurances, wills and documents," and wherein there was raised the question of how a statement of claim in such an action should be drawn. In the course of the opinion on appeal, the following language was used:

> "The object of the rules is that the plaintiff should state his case and be tied to it, and I am of opinion this statement of claim is bad.

> "What possible justification is there for the allegation in this statement that the plaintiff in the alternative is entitled to the lands under various Crown grants? Why is not the Crown grant to be stated? What difficulty is there in the way of stating it? This pleading is in reality a fishing statement of claim, and the appeal must be allowed."

It will be observed that the objectional pleading in the foregoing case was entered by the plaintiff. The authorities cited in this brief show the sufficiency of the bills of complaint in the pending suits, being brought under state statutes and as construed by state decisions and affirmed by United States Supreme Court decisions. The complainants, however, made their offer to set out whatever details of title defendants might demand. The motion of complainants for a statement of further and better particulars of the claim of defendants to title was directed to the alleged equitable defense set up in the answer of defendants. The following English case shows with what particularity a defendant is required to set up his claim of title where such claim is based upon any equitable ground; the English rule does not differ in any material respect from American practice in general as to the particularity required in the pleading of equitable claims and defenses, whether by the plaintiff or defendant. The following English case refers to Philipps v. Philipps et al., supra, and states that the rule, made applicable to plaintiffs in the Philipps case, is likewise applicable to a defendant relying upon an equitable claim. The other English case referred to above is Sutcliffe v. James (July, 1879), 27 Weekly Rep. 752, in which it is said:

"In this case it appears to me that the plaintiffs have succeeded. The title begins with a lease of the premises in Bridge street, Cardiff, in 1829:— (His lordship then stated the facts of the case, and came to the conclusion that the contents of the deeds, of which the drafts had been tendered in evidence and objected to, had been sufficiently proved, and continued:—) If this were all, I should give judgment for the plaintiffs. But in this case the defendant has insisted, in the first place, upon a legal title; he has put the plaintiffs to the strictest proof of these deeds; he has made no disclosure, and then, not content with this, he has further set up an equitable title. He says that he claims this property through the persons entitled in reversion to Mrs. Price. * * * He does not choose to say what the assurances were by which Mrs. Miles' interest vested in him. In my opinion, this pleading is insufficient. I read ord. 19, r. 15, which says that 'no defendant, in an action for the recovery of land, who is in possession by himself or his tenant, need plead his title, unless his defense depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defense that he is so in possession.' That, in my judgment, leaves a defendant depending for his defense upon an equitable estate in exactly the same position as any other person who depends upon such an estate. Then I turn to ord. 19, r. 4, and that says that 'every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies.' In a case, then, of the present kind the defendant must state the various facts on which he relies; and what are those facts? Clearly the 'divers mesne acts and assurances' by which Eliza Miles' interest was transferred to the defendant. These the defendant has not stated; he has only stated the results which follow from

them, which is not in accordance with the rule. In coming to this conclusion, I am strongly fortified by the case of Philipps v. Philipps. In that case, it is true, the question turned on an allegation of the plaintiff's; but in my view a defendant who relies upon an equitable title is in the same position as a plaintiff. This being so, ought the defendant to have leave to amend? In my opinion, he ought not to have leave to amend. The defendant has resisted the production of documents and he has never stated the effect of the documents in his possession. To use the homely old phrase, he was 'entitled to sit upon his deeds', and he declined to allow even the short effect of those deeds to be known. This being the course which he has hitherto pursued, I think it would be unjust in the present stage of the proceedings to allow him now to adopt a different course, and there must be judgment for the plaintiffs as prayed."

The course of appellees in the pending suits constitutes a record of inordinate resistance and obstruction to the ordinary progress of a suit in equity.

The record shows a disposition on the part of defendants to avoid trial upon the merits, to delay such trial, and if possible to defeat a trial through a technical position on their part. If complainants own the property involved, justice demands a speedy determination and equity does not look with complacence upon efforts to delay or defeat its ends.

"Inasmuch as the so-called demurrer was fatally defective in lacking affidavit of defendant and certificate of counsel required by Rule 31 there was no error in disregarding it and entering a decree pro confesso. * * * While in this motion and petition there are stated many matters in which de-

> fendants claim there was error on account of which the decree should be set aside and the defendant given leave to plead, and while there is a general allegation that it has a full, perfect, and meritorious defense to the demand set up in the bill yet * * * the case has presented an effort on the part of defendant to avoid or delay the payment of a just debt.
>
> "Of course, it need not be said that under such circumstances a court of equity will not strain a point to assist defendant."
>
> Sheffield Furnace Co. v. Withrow, 149 U. S. 574; 37 L. ed. 853, 855.

In law the defendants clearly became and remain in default and in neither law nor equity are they entitled to relief therefrom.

THE TRIAL COURT HAVING ERRED IN SETTING ASIDE AND VACATING THE ORDERS FOR DECREES PRO CONFESSO, ITS ORDERS SHOULD BE REVERSED, AND THIS COURT SHOULD MAKE FINAL DECREES IN FAVOR OF APPELLANTS, DISPOSING OF THE SUITS.

The appellate court has a right to do what the court below should have done, that is, to make final decrees pro confesso as of the term at which they should have been made and entered.

> Richmond v. Atwood, 52 Fed. 23 (collecting authorities);
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> Potter v. Beal, 50 Fed. 864;
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> Baker v. Warner, 132 U. S. 568; 58 L. ed. 384, 9;
>
> Scott v. Sanford, 19 How. 393; 15 L. ed. 710;
>
> Harrison v. Clarke, 182 Fed. 765.

In Richmond v. Atwood, supra, the Court said (page 23):

> "Unquestionably the circuit court upon the hearing therein might have found the facts against the complainant and dismissed the bill, and the question presented is whether this court, having an appeal before it involving the same record and the same facts, may, if error is found upon the general question of right, proceed to do what the court below should have done; or shall this court, although it has examined the record, and determined the right under the patent the other way, simply dissolve the injunction, permit the accounting to go on, and after the useless expense and annoyance incident to such an investigation, upon re-examination of the same record, by the same court, put in execution the right which it had necessarily determined in the appeal theretofore considered? * * * a rule which would permit such circuity and circumlocution is unnecessary, and would not be useful to either the parties or the court."

And again at page 28:

> "Under the authorities and the equity practice to which we have referred, and upon principle, it seems to us clear that, while the appellate court is not bound by an inflexible rule so to do, it may in its discretion, and should, when equity so requires, make full direction as to the manner in which the cause shall be disposed of below."

In Scott v. Sanford, supra, the Supreme Court of the United States, speaking through Mr. Chief Justice Taney, said (15 L. ed., p. 710):

> "The correction of one error in the Court below does not deprive the appellate court of the power of examining further into the record, and correcting any material errors which may have been committed by the inferior court. There is certainly

> no rule of law—nor any practice—nor any decision of a court—which even questions this power in the appellate tribunal. On the contrary, it is the daily practice of this court, and of all appellate courts where they reverse the judgment of an inferior court for error, to correct by opinions whatever errors may appear on the record material to the case; and they have always held it to be their duty to do so where the silence of the court might lead to misconstruction or future controversy * * *. And this has been uniformly done by this court, when the questions are in any degree connected with the controversy, and the silence of the court might create doubts which would lead to further and useless litigation."

In Harrison v. Clarke, supra, the rule is concisely stated as follows:

> "It is well-settled practice in the federal courts of appeal in reviewing equity causes to dispose of them finally on the record before the appellate court and not remand them for further trial in the Circuit Court. * * * the advisability of putting an end to litigation with all convenient speed requires us to closely adhere to the practice so well established."

In Potter v. Beal, supra, it is said:

> "We have no doubt that when this court properly takes jurisdiction on appeal from a final decree it has power to go beyond a mere reversal, and to enter such decree as should have been entered by the court below on the whole case as appearing in the record; nor have we any doubt that it is likewise its duty to review all the interlocutory proceedings of every character, using the term in the largest sense, with reference to which objections have been seasonably made and insisted on."

But for the action of the lower court in having erroneously vacated and set aside the orders for the decrees pro confesso, appellants would have, at the expiration of thirty days from the date of said order, had final decrees pro confesso entered, as was their right under the equity rules, and, therefore, if this court finds that appellees were in default it should either make and enter decrees, or in event it shall not do so, it should direct the entry of final decrees as of the term of entry of the orders for decrees pro confesso. Otherwise, appellees will assert a right to make application to the trial court to set aside the decrees under Equity Rule 17, and to come in at that time, however distant and long delayed, and do what they should have done many months ago. Should such application be made and allowed by the lower court, it would be the duty of the appellate court to set aside such orders on a second appeal, for the time at which such application could have been made has passed and the appellees are not now entitled to seek commiseration and the mercy of the court. In the interests of substantial justice, courts often relieve litigants from the effect of the error of their ways, if application be seasonably made, but it has always been held, in both the federal and State courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, and where the facts are within the knowledge of both parties, does not constitute a basis for relief at law or in equity. In other words, mere mistake or ignorance of the law, standing alone, does not constitute an excuse or defense against its enforce-

ment. It would be impossible to administer the law if ignorance of its provisions were a defense thereto.

8 Encyc. U. S. Rep. 423, 4, and long list of cases cited;

10 Ruling Case Law 304;

Utermehle v. Norment, 197 U. S. 40, 55; 49 L. ed. 655, 661, 2;

Upton v. Tribilcock, 91 U. S. 45, 50; 23 L. ed. 203;

Snell v. Atlantic F. & M. Ins. Co., 98 U. S. 85; 25 L. ed. 52;

U. S. Bank v. Daniel, 12 Pet. 32; 9 L. ed. 989, 998;

Hunt v. Rousmaniere, 1 Pet. 1; 7 L. ed. 27, 33;

Mantle v. Casey, 31 Mont. 408; 78 Pac. 593;

Brooks v. Johnson, 122 Cal. 572;

Shearman v. Jorgensen, 106 Cal. 483;

Note to R. R. Co. v. Jones, 55 Am. St. Rep. 498;

Boggs v. Fowler, 16 Cal. 559; 76 Am. Dec. 561;

Hawralty v. Warren, 18 N. J. Eq. 124; 90 Am. Dec. 613;

Yancey v. Downer, 5 Litt. (Ky.) 8; 15 Am. Dec. 35;

Dickerson v. Ripley Co., 6 Ind. 128; 63 Am. Dec. 373;

Piano Mfg. Co. v. Murphy, 16 S. D. 380; 92 N. W. 1072; 102 Am. St. Rep. 692.

The rule is thus stated in 8 Encyc. U. S. Rep. at page 423:

"It has been held from the earliest days, in both the federal and state courts, that a mistake of law,

pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitues no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake'' (citing long list of cases).

And at page 424:

''But relief is granted in cases of mistake of law in exceptional cases. But there must be some element, other than a mere mistake of law, which will afford an excuse.''

Again, at page 426:

''Mistake or accident, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence 'which may be fairly expected from a reasonable person' * * *''

And yet again, page 427:

''There must be diligence in discovering the mistake and asserting right to relief.''

And even where consideration is sometimes shown, and relief extended, in some few exceptional cases of mistake of law, the circumstances of the particular case must be extreme and attended with some condition such as would warrant the belief that undue advantage was taken; such, for instance, as a marked disparity in the position and intelligence of the parties, with the result that on the one side undue influence is exercised, while on the other undue confidence is reposed. Hence, in addition to the mistake of law, there must be circumstances which tend to show misrepresentation, surprise, undue influence, misplaced or undue confidence,

unfair or deceptive conduct, or something partaking of the nature of fraud or imposition. Assuredly, nothing of the nature of either of the foregoing is attributable to the parties herein. It is manifest that this is not a case attended with such circumstances as would warrant relief from a pure and simple mistake of law. Furthermore, "there must be diligence in discovering the mistake and asserting right to relief."

In a note to 55 Am. St. Rep. (at page 498) the rule is said to be:

> "The result of the authorities is, that ignorance or mistake of law alone, and hence of one's rights, does not, as a rule, excuse, and that it is no ground for either defensive or affirmative relief in equity, and such ignorance or mistake includes misconception of the law, erroneous deductions, and misapprehension of legal rights" (citing cases).

And again at page 500:

> "Equity will not relieve against a pure mistake of law, if there is no fraud, imposition, misrepresentation, undue influence, imbecility of mind, misplaced confidence, or other special circumstances of a similar character * * *".

In the recent case of Utermehle v. Norment, supra, the Supreme Court of the United States said:

> "We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto. There are cases, undoubtedly, where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of fact relating thereto, will be regarded as a defense, but there must be some element, other

than a mere mistake of law, which will afford an excuse. In addition, there ought to be no negligence in attempting to discover the facts. * * * It has been held from the earliest days, in both the Federal and state courts, that a mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitues no basis for relief at law or in equity, and forms no excuse in favor of the party asserting that he made such mistake. * * *

"Exceptional cases where relief has been given have been, as stated, where there was fraud or imposition upon the individual by the person seeking to avail himself of the contract of the other party."

Mantle v. Casey, supra, was a case wherein counsel for defendant filed a motion to quash the summons, believing that such motion would prevent the entry of a default, and that if the decision were against the motion the court would permit defendant to answer. In commenting upon this feature the Court said:

"It is immaterial whether such practice had been recognized or followed, or whether rules in that regard had been adopted. Courts cannot establish rules or recognize a practice which is contrary to that prescribed by the statute. Defendants' attorneys were charged with knowledge of the practice provided by this statute. Their failure to appear or answer was not caused by surprise, inadvertence, or excusable neglect, but by a misunderstanding of the law. '*Ignorantia legis neminem excusat.*' A mistake in the law is not such excusable neglect, inadvertence, or surprise as will be sufficient to set aside a default. Chase v. Swain, 9 Cal. 130."

In Shearman v. Jorgensen, 106 Cal. 483, the Court said:

"Defendants' counsel asks to have the judgment set aside, as appears by the foregoing recitals taken

from the affidavits, upon the grounds: 1. That he did not consider the notice of the overruling of the demurrer a legal notice at the time it was received, and, in effect, admits that he has since ascertained that he was mistaken as to the law; 2. He drafted an answer (long after his time to answer had expired) which he thought had been served and filed, but, through inadvertency upon his part, it had not been done. The causes for the inadvertency are not stated in the attorney's affidavit. Stripped of unimportant matters, these are the material facts disclosed by his affidavit, and we think they disclose a case barren of any merit, for mistake as to the law bearing upon the question of notice cannot be urged by him with any hope of success. Regardless of his lack of knowledge that plaintiff's attorney was a nonresident of the City and County of San Francisco, he admits that he received the notice through the post office December 9th, and this in law amounted to a personal service (Heinlen v. Heilbron, 94 Cal. 636). Under these circumstances the attorney's plea of ignorance of the law as to the validity of the notice would be paralleled by a plea that he did not know that an answer to plaintiff's complaint was required to be served and filed."

The same rule is followed in Brooks v. Johnson, 122 Cal. 572, in the following language:

"Upon a motion for a new trial, the attorney for the appellant read an affidavit to the effect that he received the notice of the motion to set the cause for trial, but supposed that he would receive a notice for the time for which it would be set; that he did not receive such notice, nor have any knowledge that the case had been set for trial, until after the trial had been had and judgment entered. * * *

"An attorney is presumed to know the rules of the court in which he appears, and his want of

such knowledge does not authorize the relief from a judgment taken against him upon the ground of surprise. The failure of the attorney to give any attention to the notice that on the 2d of November an application would be made to have the cause set for trial cannot give him any greater right than he would have had if he had been present on that day; nor was the plaintiff required to give him any notice of the day that had been set by the court for the trial of the cause."

Nor does the fact that an inferior court made an erroneous decision upon a question of law and that a party litigant was misled thereby and suffered a loss constitute ground for relief in equity.

10 R. C. L. 314, Sec. 57;

Jacobs v. Morange, 47 N. Y. 57;

Doll v. Earle, 65 Barb. 301;

Dickerson v. Ripley County, 6 Ind. 128; 63 Am. Dec. 373;

Kenyon v. Welty, 20 Cal. 637; 81 Am. Dec. 137.

Jacobs v. Morange, supra, was a case in which defendant obtained judgment against plaintiff in the Marine Court of the City of New York. Plaintiff carried it for review to the Court of Common Pleas of that city, where judgment was reversed. Subsequently, the Court of Appeals decided that the Common Pleas had no jurisdiction. Defendant issued execution upon his judgment in the Marine Court. Plaintiff, thereupon, instituted this action in equity and obtained judgment granting a perpetual stay of defendant's proceedings, on the ground that the judgment in the Marine Court was erroneous, and that the parties had acted under

a mutual mistake of law in the review in the Common Pleas. The order granting the injunction was reversed, the Supreme Court saying:

> "The whole basis for this relief is founded upon the fact, that an inferior court made an erroneous decision upon a question of law. This is the best position the plaintiff can take. This must be the 'surprise' sometimes spoken of in the books.
>
> "What a flood of litigation would such a rule open? If this can be regarded as the 'surprise' that requires or justifies equitable relief, how broad is the principle, how etxensive its ramifications? Almost every case reviewed by this court would form a basis for such 'surprise'; especially where courts of last resort review or modify their own decisions. How many cases are lost in the trial or upon review by the ignorance of counsel in failing to perceive the point, or in failing to present it properly for review. How easy to get up cases, in the ordinary affairs of life, of a misunderstanding of the law * * *. Under such a system it would be difficult to reach the end of a lawsuit. * * *
>
> "Suppose a plaintiff had misunderstood the statute as to the time to appeal, could a court of equity extend the time prescribed by statute? Many such cases have occurred, from a misapprehension of the law as to when a judgment is perfected. Courts of law could grant no relief, and I am not aware that any lawyer has supposed that a court of equity had any more power to extend the statute."

Mistake of an attorney as to the law is not ground for relief in equity, as it cannot be based upon surprise, inadvertence, or excusable neglect, but is a misunderstanding of the law, and is not a sufficient excuse, for not

pleading in time, to authorize the setting aside of a default julgment.

10 R. C. L. 314;

Mantle v. Casey, 31 Mont. 408; 28 Pac. 593;

Brooks v. Johnson, 122 Cal. 572;

Sherman v. Jorgensen, 106 Cal. 484;

Allen v. Continental Ins. Co., 97 Ill. App. 164;

Phifer v. Travellers Ins. Co., 123 N. C. 405; 31 S E. 715;

Bardonski v. Bardonski, 144 Ill. 284; 33 N. E. 39.

For

> "if our errors are in themselves grounds for interposition in favor of our clients, surely they shall not be without cause of redress, and the worst of us shall have precedence over the best,"

to quote the language of the digester in note to 31 Am. St. Rep. 250.

An attorney is bound to know the rules of the court and ignorance or mistake on his part is not a good excuse for neglect to take the proper proceeding within the time allowed by law and the rules of court. Reasonable compliance with the rules prescribed is expected and will be insisted upon.

Green v. Elbert, 137 U. S. 615, 621; 34 L. ed. 792;

Richardson v. Green, 130 U. S. 104, 112; 32 L. ed. 872.

Where a motion, which has been filed out of time, or without authority under the rules or statute, is pending, the time for doing that which the law required to

be done is not extended or held open by such motion and default is properly entered.

Highley v. Pollock, 21 Nev. 198; 27 Pac. 895;
Shinn v. Cummins, 65 Cal. 98; 3 Pac. 133;
McDonald v. Swett, 76 Cal. 258; 18 Pac. 324;
Phillips v. Kerr, 26 Ill. 213;
Mantle v. Casey, 31 Mont. 408; 78 Pac. 593.

And where the motion is of such a character that plaintiff is justified in treating it as a nullity, default is properly entered and will not be set aside.

Sheffield Furnace Co. v. Witherow, 149 U. S. 574; 37 L. ed. 853;
Dudley v. White, 44 Fla. 264; 31 So. 830;
Stapp v. Thomason, 2 Litt. (Ky.) 214;
Insurance Co. v. Porter, 44 Fla. 568; 33 So. 473;
Daniell v. Sanderson, 22 Pa. St. 443.

In Sheffield Furnace Co. v. Witherow, supra, the Supreme Court held that a final decree pro confesso was properly entered, disregarding a demurrer on file which lacked the certificate of counsel and affidavit required by the rules.

Putting aside the question of mistake or inadvertence, which it is manifest appellees could not hope to urge with any degree of success, especially since their attention was repeatedly directed to the principle involved in Equity Rule 32, their election to totally disregard the rules and stand unqualifiedly upon their purported right to be heard upon a motion to dismiss prohibits them from now being heard to say that their failure to file an answer to the amended bills of complaint as required by the rules was due to inadvertence.

Suppose a defendant interposed a demurrer to a bill, and, after an order overruling same, he refused to answer and suffered a judgment to be entered against him. Upon a judgment of affirmance in the appellate court, could defendant then be heard upon a motion to file an answer to the merits? Not any more than appellants could successfully move to file an amended bill after their refusal to amend upon permission being given by the trial court and the order sustaining the dismissal had been affirmed by this court.

In either case, the party made his election and it is elementary that he would be compelled to abide it, just as appellees should be required to abide their election to stand on their asserted right to file a technical objection instead of answering in compliance with the rules of court and of practice.

Aurora City v. West, 7 Wall. 82, 99; 19 L. ed. 42;
Bank v. Buckner, 20 How. 108; 15 L. ed. 862;
People v. Jackson, 24 Cal. 633;
Sutter v. San Francisco, 36 Cal. 116;
Penhallow v. Doane, 1 L. ed. 507, 527.

In People v. Jackson, supra, the Court said:

> "We are asked to modify our judgment so as to grant the relator leave to amend his complaint. However much we might be disposed to grant the petition in this respect, we are precluded from doing so by the course which counsel saw fit to pursue in the court below. We can only review the action of the court below, and if that be found right, the only judgment which we can render is one of affirmance. The relator had leave to amend his complaint in the court below, but declined to do so—electing to stake his fortune upon the complaint as

> it then stood. Had he asked leave to amend, and had leave to amend been refused, there would have been action on the part of the court which we could review. As it is, there has been no action in the court below adverse to the relator's right to amend, and it follows that no action can be had upon the question in this court."

It follows, therefore, that, since there are no legal or equitable grounds upon which appellees would be entitled to relief from a decree pro confesso, the court should on this appeal, inasmuch as its silence might create doubts or misconstruction which would lead to further and useless litigation, render such decision as will preclude the possibility of the court below entertaining a motion for relief in the nature of an application to have the decrees set aside and permission given appellees to answer. Such a course will avert vexatious delay and unnecessary expense which would be incident thereto, assuming that this court would order a reversal of such orders by the lower court, if made. In short, all phases of the situation which are possible of determination at this time, the full record being before the court, should be disposed of by the court's present order and the litigation finally terminated.

Appellees stood upon their claimed right to file motions to dismiss the suits. They took the benefit of the delay pending the hearing of said motions; they were successful in the lower court and have taken the benefit of the delay gained by them through their motion to dismiss.

It is a general principle that where a party takes the benefit of any mistake and the other party suffers

loss therefrom, the benefited party may not later seek to correct the mistake to his further advantage.

> "It may be laid down as a general principle that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. * * * If it were a mistake * * * it was one made by the defendant of which he took the benefit, and the plaintiff the loss, and it is too late to correct it."
>
> Davis v. Wakelee, 156 U. S. 680, 689; 39 L. ed. 578, 584.

In the pending suits the record shows no ground whatever for a departure by this court from the recognized policy of appellate courts, particularly in equity, "to dispose of suits finally on the record before the appellate court and not remand them" (Harrison v. Clark, 182 Fed. 765 (supra).

In Baker v. Warner, 231 U. S. 588, 593; 58 L. ed. 38, 49, it is said:

> "We are not limited, however, to a consideration of the point presented by the plaintiff, this being a writ of error from an intermediate Appellate tribunal, but must enter the judgment which should have been entered by the court below on the record then before it."

We submit the record herein as entitling the appellants to whatever decrees the court below should have entered on the record then before it and petition this court to make its decrees herein final as of the time the court below should have made decrees in favor of appellants.

THE NEXT AND LAST QUESTION TO BE CONSIDERED IS WHETHER THIS COURT HAS JURISDICTION TO MAKE DECREES IN ALL SIXTEEN SUITS, CONSOLIDATED BY ORDER OF THE COURT BELOW "FOR THE PURPOSES OF APPEAL", PRIOR TO THE DECREE OF DISMISSAL (Tr. p. 43).

The suits consolidated with suit No. 88, Ennis-Brown Company, a corporation, v. Central Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, are suits No. 89, J. C. Wickler v. Same; No. 90, L. E. Bontz v. Same; No. 91, Katarina Haub and John Haub v. Same; No. 92, George K. Rider v. Same; No 93, Millen Realty Company, a corporation, v. Same; No. 94, Charles Colquhoun v. Same; No. 95, Cordelia Elkus v. Same; No. 101, Mary Helen Curtis v. Same; No. 102, Adams Realty Company, a corporation, v. Same; No. 103, Mebius and Drescher Company, a corporation, v. Same; No. 126, P. C. Drescher v. Same; No. 127, Heenan Investment Company, a corporation, v. Same; No. 128, F. B. Adams v. Same; No. 129 A. S. Hopkins Company, a corporation, v. Same; No. 130, John Breuner Company, a corporation, v. Same.

The order of consolidation, in this instance, specified that it was for purposes of an appeal. Section 921, Rev. St. U. S., provides that:

> "When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

The effect of an order of consolidation, as extending throughout the life of causes, including their course through appellate courts, has been recognized by both Circuit Courts of Appeals and by the United States Supreme Court in many instances and under widely varying circumstances. The purpose of the statute is said to be "to avoid unnecessary costs or delay in the administration of justice."

In United States v. Baltimore & O. S. W. R. Co., 159 Fed. 33, under suit Nos. 1776, 1771, the Circuit Court of Appeals (Sixth Circuit) says:

> "The two causes above entitled were heard together in this court, being alike in all essential particulars. They were 2 of 12 similar causes in which suits were brought by the United States to recover penalties for several violations by the defendant railroad company of an act of Congress entitled 'An act to prevent cruelty to animals while in transit by railroad or other means of transportation' from one state to another. * * *
>
> "The causes were properly consolidated. Section 921 of the Revised Statutes (U. S. Comp. St. 1901, p. 685) provides that 'when causes of a like nature or relative to the same question are pending before a court of the United States,' this may be done. Whether one judgment may be given for all or a separate judgment in each case will depend upon the special circumstances. If it is necessary to the due administration of the law and the protection of the rights of the parties that the integrity of the several causes shall be so far preserved as to secure the proper result in each case, to the end that the party aggrieved may not be embarrassed thereby in seeking relief against the judgment or for any other sufficient reason, the court will direct the proceedings accordingly. The statute is one for convenience in saving expense to the parties and the time of the court."

An appeal was taken in the foregoing suit or suits to the United States Supreme Court, reported in 220 U. S. 94; 55 L. ed. 385. In the statement by Mr. Justice Lamar preceding the opinion, there appears the following:

> "The court sustained the company's motion to consolidate the causes, entered judgment for a single penalty, and ordered 'that the within order in case 1866 shall apply to, operate upon, and be conclusive of, all the rights of the plaintiff in each of the several causes, to wit, 1867-1874, 1880 and 1884.' The government sued out a writ of error in case 1866, and, apparently out of abundant caution, another in 1867, later entering into a stipulation in the circuit court of appeals that the result in these two cases should control all the others.
>
> "The circuit court of appeals for the sixth circuit (86 C. C. A. 223, 159 Fed. 33) held that the order of consolidation was proper but reversed the judgment on the ground that the United States were entitled to recover eleven penalties, or one for each of the eleven shipments."

Again in the opinion it is said (page 389):

> "The court, we think properly consolidated all the cases (Rev. Stat., Sec. 921, U. S. Comp. Stat. 1901, p. 685), and, as consolidated, the amount of the possible penalties sued for in the eleven actions was fifty-five hundred dollars. The company is liable for nine penalties, because nine times it failed to unload as required by the statute. One penalty should be imposed as to animals referred to in cases numbered 1871 and 1872, and one as to those in 1869 and 1873, where the time for the required unloading respectively coincided. In other respects the judgment of the Circuit Court of Appeals, reversing the judgment of the District Court is affirmed."

It will be observed that in the foregoing case there was an order of consolidation of twelve cases made in the court of first instance. Two writs of error were sued out, one in case No. 1866 and another in case No. 1867, the latter being "apparently out of abundant caution"; that later, a stipulation was entered into in the Circuit Court of Appeals to the effect that the result in the two cases should control all the others. There is no suggestion of doubt on the part of either appellate court in the foregoing case as to jurisdiction over all the cases under the circumstances there present.

In Headrick v. Larson, 152 Fed. 93 (96), Judges Gilbert, Ross, and Morrow sitting, it is said:

> "The stipulation for the consolidation of all these proceedings and for the submission to this court of the questions involved therein is filed in this court. There was no stipulation in the court below, nor were the causes there consolidated. The jurisdiction of this court is confined to the review of error committed in the court below in the cause which is brought before us upon appeal. It does not extend to errors committed in other causes. The counsel who appear for the appellees in this court were not the counsel who signed the stipulation, and they now object to the jurisdiction of this court to review any question which is not directly involved in this appeal. This they have the right to do."

In Louisville & N. R. Co. v. Summers, 125 Fed. 719, it is said:

> "At the hearing of this cause our attention was attracted to the circumstance that, although it was proposed to review two separate judgments, only one writ of errror was sued out and one assignment of errors filed. Technically this was irregular, as the consolidation of the causes in the court below

> was only for convenience in trying them. The verdict and judgments were separate, as they should have been, and had no dependence upon one another, and no relation, except that they rested upon a similar, and to some extent a common, record. But the defendant in error makes no objection on that account, and we conclude we may waive the irregularity, as was done by the Supreme Court in similar circumstances in Brown v. Spofford, 95 U. S. 474, 24 L. ed. 508."

In Brown v. Spofford, cited in the foregoing case, it is said:

> "Nothing remains for remark but to advert very briefly to certain irregularities which appear in the proceedings. Judgment rendered in the first suit before the parties went to trial in the second, and yet defendants were allowed to file eight bills of exceptions which purport to be applicable to each of the two cases; and the judgment in each case is removed here by one writ of error, though the transcript does not show that the two cases were ever consolidated. Such proceedings are palpably irregular, but, inasmuch as they are not the subject of objection by either party, the court has decided to exercise jurisdiction and dispose of the controversy."

Hence we find that jurisdiction has been exercised over many cases under a single writ of error where there has existed neither order of consolidation nor stipulation. Indeed, appellate courts are inclined to review and dispose of all cases on appeal which have been considered together in a court below. We know of no case where an appellate court has refused to recognize the force of an order of consolidation on appeal; this is true, notwithstanding the records examined have been of suits wherein the appeals have been taken

up as individual cases on separate records, upon a single record containing the several cases, or upon a single record of one or more of the cases consolidated. Appellate courts have ignored the method pursued. The purpose of the statute is to minimize delay, expense and labor, and appellate courts have not been captious as to the method pursued in accomplishing the purpose of the statute. As tending to show the favor with which orders of consolidation are looked upon by appellate courts, we quote from Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285; 36 L. ed. 706:

> "Where the English consolidation rule has not been adopted, the American courts, state and Federal, have exercised the authority of ordering several actions by one plaintiff against different defendants to be tried together, whenever the defense is the same, and unnecessary delay and expense will be thereby avoided. (Citing cases.) The learning and research of counsel have produced no instance in this country, in which such an order, made in the exercise of the discretionary power of the court, unrestricted by statute, has been set aside on bill of exceptions or writ of error."

It is said in R. C. L., Vol. 1, page 361:

> "But under a statute authorizing the consolidating of actions it has been held that the consolidation merges all the actions into one suit. There may be many causes of actions but the effect of consolidation is to join them all in one suit."

and in Castro v. Whitlock, 15 Tex. 437, it is said:

> "When two suits are consolidated they constitute thereafter but one suit."

We submit that the authorities above cited show that this court has jurisdiction to make decrees in all suits,

and appellants respectfully petition this court that it exercise its jurisdiction in that regard, and make therein final decrees granting to appellants the relief prayed for in their several amended bills of complaint and disposing of said suits, reversing the decrees of dismissal of the lower court, and correcting the several orders of the lower court herein complained of, the making of which appellants have assigned as error.

Dated, San Francisco,
March 15, 1916.

Respectfully submitted,

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for Appellants and Complainants.

EDWARD ELLIOTT,
ROY S. BARTLETT,
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